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ASYLUM ADJUDICATION

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
IMMIGRATION AND REFUGEE POLICY
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

HOW DO WE DETERMINE WHO IS ENTITLED TO ASYLUM
IN THE UNITED STATES AND WHO IS NOT?

OCTOBER 14 AND 16, 1981

Serial No. J-97-66

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ASYLUM ADJUDICATION

WEDNESDAY, OCTOBER 14, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY,
Washington, D.C.

The subcommittee met at 1:10 p.m., in room 412, Russell Senate Office Building, Hon. Alan R. Simpson (chairman of the subcommittee) presiding.

Present: Senators Simpson and Grassley.

Staff present: Richard W. Day, chief counsel; Arnold H. Leibowitz, special counsel; Donna Alvarado, counsel; Jerry Tinker, counsel for Senator Kennedy; Ally Miller, counsel for Senator Grassley.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, A U.S. SENATOR FROM THE STATE OF WYOMING, CHAIRMAN, SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY

Senator SIMPSON. We will proceed.

I welcome you to our continuing series of hearings on immigration and refugee policy reform matters.

We are here today to address a matter which often appears to be quite technical, but in fact it relates to the very heart of the asylum process. How do we determine who is entitled to asylum in the United States and who is not?

On July 31, this subcommittee held extensive hearings on the United States being a country of mass first asylum, a very new role for us. At that time we heard in great detail from the Government, from representatives of impacted communities in the United States, particularly in Florida; from voluntary agencies; and from our colleagues in the House on the difficulties and confusion that mass first asylum has caused in the United States, and the passions that it has aroused.

So, we will want to respond to the valid concerns of these communities while at the same time permitting individuals with legitimate asylee claims to be accorded refuge in the United States.

The raw numbers—I hate to come back to those always in this line of legislative activity but I must—those numbers indicate the extent of this issue in the United States. Over 133,000 people arrived last year, next to the Cuban and Haitian influx, and since the date of October 10, 1980, over 10,000 Haitians have come to our shores, almost all of them pleading asylum.

So, today we shall discuss this issue of mass first asylum, a phenomenon of large numbers of persons who enter and immediately

request asylum. We will wish to hear how these determinations have proceeded and what changes should be made in future asylee situations.

We will also discuss the issue of those who are here who enter without documents and subsequently, usually in connection with an exclusion and deportation hearing, then plead asylum; is that being misused.

There are nearly 95,000 persons who are now claiming asylum. The number has caused our adjudication procedures to clog up and literally ossify. We are all aware that our procedures are too cumbersome and unfair to those who appropriately should gain asylum.

During the course of this hearing we shall seek to resolve two basic issues:

First, how shall we determine the legal status of those who entered the country and plead asylum?

Second, how should we determine, by what procedure, the rights of those who enter the United States for some other purpose and, subsequently, then plead asylum?

We will hear, I am sure, a bit about the issues of due process. Are we rendering more due process to asylees than to our own citizens?

We shall address the issue of interdiction, detention, separate asylum adjudications, the role of the State Department, and the nature of the Federal judicial review of asylum proceedings. All of these certainly greatly affect and impact on the basic question.

Of course, we must always recall that the United States is a signatory party to the 1968 United Nations Protocol relating to the status of refugees and it is bound by that agreement to refrain from returning persons to a country where they will be persecuted.

We, as citizens of the United States, are very proud, obviously, of our freedoms and our general tradition of offering haven to the persecuted of the world. It is indeed unfortunate that so many people reside in nations whose standards of individual freedom do not match ours.

Nevertheless, the United States cannot and should not attempt to accept the sole responsibility for this tragedy by resettling all who leave their homelands bound for our shore. So, it is up to us in this great revision process to develop clear and strong policies and procedures to speedily determine and distinguish frivolous asylum claims in order that we may assure that true refuge for legitimate asylees is provided equitably by us and by all of the other nations of the free world.

Those are some of my observations as we proceed with this asylum adjudication hearing today.

I have a statement from Senator Kennedy and we will enter it into the record.

[The prepared statement of Hon. Edward M. Kennedy follows:]

PREPARED STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

I commend Chairman Simpson for holding these hearings to receive wide-ranging testimony on the complex and difficult issue of adjudicating the number of asylum claims in the United States, especially by persons arriving on our shores by boats from Cuba, Haiti, and other countries in the Caribbean.

America has historically been a haven for "boat people"—from the Pilgrims at Plymouth Rock, to the political exiles from 19th century Europe, to the Jews fleeing the Holocaust, to the refugees from Indochina. We are still a Nation deeply concerned over the plight of refugees and over the human rights of those who flee persecution in their native lands. But we are facing mounting problems coping with the tide of refugees.

Clearly, the immigration laws are outdated and inadequate to meet modern needs. The Immigration and Naturalization Service is understaffed and undertrained to deal with complex asylum and refugee claims. The Department of State gives too little priority and too little staff resources to deal with the escalating number of asylum claims. Our policy toward one of the most immediate issues—the flow of Haitian boat people—remains mired in endless litigation, recriminations, and distrust, resulting in the unfair and inhumane treatment of those seeking help.

To break this cycle of indifference and to correct the legal as well as humanitarian deficiencies of existing law and policy, I supported the reforms recommended by the Select Commission on Immigration and Refugee Policy. These recommendations represent a sound basis for developing an asylum policy that is both fair and effective.

The Commission recommended that: An interagency body be established to develop procedures, including contingency plans for opening and managing federal processing centers to handle possible mass asylum emergencies; mass asylum applicants should continue to be handled on an individual basis, but group profiles should be developed and used by expert personnel to determine the legitimacy of individual claims; a new position of Asylum Admissions Officer should be created within the Immigration and Naturalization Service; and in each case an asylum appeal should be heard by the same institution that hears other immigration appeals.

These are guidelines that we should pursue in establishing an asylum policy that accurately reflects our humanitarian tradition of welcoming refugees, and that meets our responsibilities under the U.N. Convention and Protocol Relating to the Status of Refugees.

Above all, we must establish a policy that deals on land with asylum claims. What we do not need is an expensive, impractical, and highly dangerous policy of adventurism on the high seas to block potential asylum claimants or illegal aliens.

Again, I welcome the Chairman's calling of these hearings and I look forward to reviewing the testimony that will be offered this week.

Senator SIMPSON. We have first the administration panel consisting of Mr. Stephen Palmer, Acting Assistant Secretary of the Bureau of Human Rights and Humanitarian Affairs of the State Department, and Ms. Doris Meissner, the Acting Commissioner of the Immigration and Naturalization Service.

I believe you have been advised of the time limitations. I am very appreciative of your being here. If you will proceed, I think, Mr. Palmer—the order would be a switch for you, Doris—Mr. Palmer first. If you will proceed, sir.

Mr. PALMER. Thank you, Mr. Chairman. My statement has been tailored to fit in with and follow that of the Acting Commissioner.

Senator SIMPSON. Fine. Please then, proceed, Doris, if you will.

STATEMENT OF DORIS MEISSNER, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ACCOMPANIED BY PAUL W. SCHMIDT, DEPUTY GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERVICE

Ms. MEISSNER. Thank you. With your permission we will enter our full statement into the record formally and make a few opening remarks.

Senator SIMPSON. Without objection.

Ms. MEISSNER. The Refugee Act of 1980, as you pointed out, provides two means of attaining refuge in the United States. The first is by application overseas and the second is through the asylum process.

The focus at the time of the passage of the Refugee Act most certainly was on overseas admissions. I think it is fair to say that asylum was at that time viewed as important but not equal to overseas admissions.

Only since 1980 has asylum come into prominence in the way that we have seen with the Mariel boatlift and the Haitian influx. In that short period the statistics tell the story. In 1978, INS received 3,700 asylum applications; in 1979, 5,800; and in 1980 and 1981, 53,000, excluding the Cuban and Haitian entrants. So, there has been a very dramatic increase in the number of people claiming asylum.

It is clear, given this change, that the present procedures and regulations governing asylum are inadequate. Given these inadequacies the administration is proposing several changes which we believe will streamline asylum and exclusion procedures and will put the United States in a position to manage the asylum issue more effectively.

The first set of proposals relates to the asylum process itself. The administration is proposing that asylum adjudications be separated from exclusion and deportation proceedings. The administration also proposes that the asylum process be administrative and not subject to judicial review, and that those people applying for asylum be processed by a new cadre of immigration inspectors to be known as "asylum officers." These asylum officers would interview persons in depth, in a nonadversarial environment, and make a judgment as to whether or not they fall within the Refugee Act; in other words, whether they are fleeing oppression and would be persecuted upon return to their home country.

The asylum officer's decision would be certifiable to the Attorney General for review but would not be subject to judicial review.

In addition to the new asylum procedures, we also propose to streamline exclusion procedures in the following fashion:

Those people who arrive in the United States without documents would be subject to summary exclusion. In other words, they would be seen by an immigration officer, and a determination would be made as to whether or not they had a right to enter the United States. The immigration officer's decision would not be reviewable by an immigration judge or any other level of review.

The precedence for these procedures is in the 1952 act and relates to crewmen who at that time were the only group of people who realistically could arrive in the United States without documents; therefore they were subject to summary exclusion.

We propose under the present circumstances where much larger groups of people are able to come to the United States without any documentation, that these procedures be expanded to include them.

Certain protections, of course, have to be built. For instance, a person who came without any papers but made an asylum claim. In that case, the immigration officer would allow the individual to remain in the country to pursue the claim. Then the asylum officer interview and the procedure that I spoke about earlier would come into play.

The last section of the proposals relating to streamlined asylum and exclusion procedures has to do with immigration emergencies. The proposed immigration emergency legislation would confer

upon the President broad powers in emergency situations such as Mariel. In those circumstances, the President would be empowered to prohibit the exit and entry of vessels, for instance, and special asylum and deportation procedures would be invoked which would allow perhaps a presumption determination, and no judicial review whatsoever.

That is a summary of our testimony. There are some more technical points in the legislation, and we could get into those in question, if you like.

[The prepared statement of Ms. Meissner follows:]

PREPARED STATEMENT OF DORIS M. MEISSNER

I am pleased to appear before this Subcommittee again in the series of hearings being held to examine important immigration issues. Today we are present to discuss asylum procedures, and the Administration's proposed changes in the asylum laws, and exclusion as well as proposals to deal with immigration emergencies.

The Refugee Act of 1980 provided two major means for persons suffering persecution to gain refuge in the United States. The first means is the overseas refugee process which has been the subject of recent consultations with this Committee. The second method to obtain refuge in the United States is the asylum process. It is fair to say that in 1979 and 1980, when the various refugee reform bills were presented and debated, both Congress and the Administration focused on the refugee process. The asylum process was looked upon as a separate and considerably less significant subject. The main desire of the drafters of the Refugee Act of 1980 was to rationalize the refugee process. Uppermost in everyone's mind was the intent to do away with ad hoc solutions to refugee situations, to provide in their place a systematic and permanent program of refugee selection and resettlement consistent with the United Nations Convention and Protocol Relating to the Status of Refugees.

As far as the asylum process was concerned, the major intention of the drafters of the Refugee Act was to establish for the first time a statutory basis for asylum. Up until that time, persons suffering persecution had been brought to the United States, or allowed to remain under a variety of programs, including parole granted by the Attorney General, conditional entry under section 203(a)(7) of the Immigration and Nationality Act, and the regulatory asylum procedures implemented by the Service. With the exception of conditional entry, the status accorded was temporary and led to no other immigration benefits. The Refugee Act provided a single asylum procedure, while leaving the option of withholding of deportation in certain cases. There was a consensus of opinion that an asylum program served important humanitarian and foreign

policy interests. There was also general agreement that the status of persons granted asylum should be consistent with that granted refugees, and that the asylum status should be made more definite.

No one involved in the drafting of the Refugee Act of 1980 anticipated that the asylum process would come to assume the major role it occupies today in the entire structure of immigration law. This lack of anticipation is hardly surprising in light of our experience with the limited asylum programs we had instituted by regulation beginning in 1972. Asylum had never been sought by large numbers of applicants. The Immigration and Naturalization Service received approximately 3,702 applications for asylum in 1978 and 5,801 in 1979. Between March 1980, when the Refugee Act was passed, and July 1981, 53,034 applications for asylum were filed by persons physically present in the United States. In addition, about 50,000 applications were received from Cuban nationals who traveled to the United States in the spring of 1980 during the Mariel boatlift. Applications for asylum during this period were received from the nationals of 53 countries, with large numbers being made by nationals of Afghanistan, Ethiopia, Haiti, Iran, Nicaragua, Poland, and El Salvador, as well as Greece, Italy, Kenya, Mexico, and Sweden. The Service estimates that about 50,000 more asylum applications will be received in Fiscal Year 1982.

The sheer number of asylum applications has severely taxed the resources of the Service, as well as those of the Bureau of Human Rights and Humanitarian Affairs of the Department of State (HA). But independently of sheer numbers involved in the process, a second major drawback has become abundantly apparent: The complexity of the asylum process. The present asylum procedures enable an applicant to apply for asylum and reopen asylum proceedings in a multi-tiered administrative hearing and appeal system, and to seek judicial review on several levels.

Present law and regulations permit a claim of asylum to be raised before a Service district director, and again before an immigration judge in the context of a deportatin or exclusion hearing. If the application is denied at those levels, the

applicant may appeal to the Board of Immigration Appeals. If the asylum applicant is again unsuccessful, the claim can be reviewed judicially on a petition for habeas corpus before a district court, or on a petition for review of a deportation order in the court of appeals, with final review authority resting in the Supreme Court.

The Department of State, through the Bureau of Human Rights and Humanitarian Affairs is involved in a major way in this process. The Bureau of Human Rights and Humanitarian Affairs provides advisory opinions on the merits of the asylum claims. As with the Service, HA has not been able to keep up with the requests.

The Administration has concluded that this state of affairs is wholly unsatisfactory. Persons with valid claims to asylum are generally confronted with long waits before the applications may be adjudicated and granted. On the other hand, it is no secret that some aliens and a fair number of attorneys who represent aliens, have come to view the asylum process, with its attendant delays, as a convenient method to prolong an excludable or deportable alien's stay in the United States. The Administration's proposed asylum legislation is meant to address the main failings of the present asylum process so that neither of these two situations may continue.

The asylum legislation would entirely separate the adjudication of asylum applications from exclusion or deportation proceedings. Asylum claims would be heard by specially trained asylum officers within the Service. These officers will be career professionals with extensive training in domestic and international law and conditions in foreign countries. They would work closely with the Department of State and other experts. The asylum officer would be an impartial judge of the asylum claim, and would work under the Commissioner of the Service.

The asylum process would have as its focal point a non-adversarial interview by an asylum officer. The applicant would have the right to present evidence and witnesses relating to the persecution claim. The applicant could be accompanied by

counsel who would have a limited role. Counsel would be allowed to advise the applicant, but could not otherwise participate in the interview. Interviews would not be rescheduled for the convenience of counsel. We consider a limitation on the role of counsel to be necessary to insure the non-adversarial nature of the interview, and to insure that attention is not diverted to peripheral issues. This is in keeping with the role of counsel in non-adversarial adjudications conducted by the INS.

The asylum officer would have the discretion to solicit information on the asylum claim from other government agencies, particularly the Department of State. It would not be necessary for an asylum officer to obtain an advisory opinion in all cases. The State Department has indicated that it supports a more flexible advisory opinion process.

An asylum officer will deliver a written opinion, containing a discussion of the facts and conclusions the decision is based upon. This decision would be administratively final, with a discretionary certification to the Commissioner or the Attorney General. This procedure will provide for review in certain limited cases, such as those where there is at issue an unusual question of law or fact.

The decision of the asylum officer would only be subject to judicial review in a proceeding brought to challenge the validity of an order of deportation, or an order of exclusion. Review under the Administration Procedure Act is expressly foreclosed. A reviewing court could only set aside the asylum officer's decision upon a showing that the denial of the application was arbitrary and capricious, or not in accordance with law.

The proposed asylum legislation also, in our estimation, improves upon the existing asylum law in several other significant ways. Although the underlying basis for an asylum claim -- persecution -- is identical to that for a claim to refugee status, there are differences in the procedures by which an applicant may be divested of asylum status as opposed to refugee status. Presently, an asylum grant may only be revoked if circumstances change in the country of persecution. The proposal adds a

provision consistent with the refugee provision, which allows revocation of status upon a determination that the asylee was not in fact a refugee within the meaning of section 101(a)(42) of the Immigration and Nationality Act.

A second substantial change has been made in the eligibility for asylum. Applications would be barred by certain categories of aliens. The first group includes "transit without visa" aliens. These are aliens who are not required to obtain a visa in order to transit the United States on their way to another country. We have experienced situations where entire airplane loads of such aliens have landed and demanded asylum, although they had tickets and entry documents to other countries. As these aliens have evaded the visa issuance process, and are able to travel on to another country where they are free to make an asylum application, barring their eligibility for asylum does not violate their "non-refoulement" provisions of the United Nations Convention and Protocol Relating to the Status of Refugees.

Aliens who entered without inspection would also be barred from asylum eligibility if they did not present themselves within 14 days to an immigration officer and did not present good reason for their illegal entry. This proposal is also consistent with Article 31 of the U.N. Convention. It is aimed at eliminating belated claims by aliens who claim, following apprehension, to have entered the United States seeking asylum. It is anomalous, to say the least, that a person who enters ostensibly for the purpose of seeking asylum avoids the very authorities who may grant asylum. Other persons not in this category would be required to make application for asylum within 14 days of the notice of institution of proceedings.

Another significant provision repeals the present section 243(h) of the Act, which permits the withholding of deportation to a country where the alien may suffer persecution. In practice, this withholding provision has proved to be confusing in application, as it parallels the asylum provision, is based on the same types of claims to persecution, and yet appears to provide a

separate claim to refuge. With the incorporation of a provision in the proposed asylum legislation which prohibits deportation to a country of persecution, there is no need for a separate withholding section.

In drafting the proposed legislation, we have kept in mind the limited resources available to carry out an asylum program. We have determined that the proposed asylum process will require a senior cadre of asylum officers. This level of staffing anticipates adjudications of up to 50,000 asylum applications per year.

I would like to turn now to issues related to the administrative and judicial processes involved in deportability or excludability. I will also discuss with you some of the legislative proposals the Administration intends to present to improve these processes.

For a long period of time, it has been apparent that the present exclusion, deportation and appeal procedures are both too complex and too time-consuming. From the time a person is first charged with being excludable or deportable to the time the process has been completed after the exhaustion of various judicial appeals, an alien will often have remained in the United States for several years. Excludable or deportable aliens are thus able to manipulate the immigration law with little risk, as simple administrative and legal maneuvers may gain them several extra years in the United States. This procedural morass has also had an adverse effect on the persons charged with the enforcement of the immigration laws, and on our court system, because great amounts of time and resources may be expended to establish deportability of excludability, without any progress being made toward the actual expulsion of the alien.

There is no reason for the government or the American public to accept an immigration system which rewards dilatory tactics. There are many reasons for both to reject it. One of the more unquestioned rights of any nation is the right to choose which non-citizens will cross its borders and which will remain. In

recent years, this basic principle has come under substantial question. By simply arriving at our borders, an alien may invoke the protection of United States laws and legal procedures to such an extent that the United States has conceded a significant degree of control over its borders, and at best is forced to go to great expense to expel an alien who had no claim to admission in the first place.

To address this problem, we are proposing substantial changes in the exclusion procedures applied to aliens who arrive without any valid documentation to support a claim to admission. Included in this category are aliens who have purchased fraudulent visas to secure passage on an aircraft, or aliens who are aboard transcontinental flights which merely stop in the United States for refueling on their way to other countries. In the great majority of cases these aliens have evaded the normal visa-issuing process.

Once this exclusion process is triggered by the demand for an exclusion hearing, the alien must be brought before an immigration judge. A record of the testimony and evidence must be compiled. Section 292 of the Act provides the right to counsel. The alien must be informed of the availability of free legal services. A decision by the immigration judge that the alien is excludable is appealable to the Board of Immigration Appeals (BIA). The alien has 13 days after a written decision of exclusion is rendered to appeal to the BIA. An appeal from an oral decision must be taken immediately after the decision is rendered. If the alien so requests, the BIA must schedule oral argument on the appeal. The BIA must issue a written decision. The final order of exclusion by the BIA may be reviewed by means of a petition for a writ of habeas corpus before a district court.

It is our view that no legal or policy reason exists which can justify this expensive and time-consuming process. Aliens who travel to the United States with the intention of using the present immigration laws as a wedge to enter simply do not deserve the numerous protections which are presently accorded. Under our proposal, an undocumented alien will be inspected by an immigration

officer who will determine admissibility. This decision will be final and not subject to further administrative or judicial review.

Conversely, for those aliens who have gone through the visa-issuing process, and who have a valid nonimmigrant visa, or who have documentary proof of permanent resident status, an exclusion hearing will be provided. This process will protect legitimate travellers and permanent residents who are returning to the United States after a trip abroad. A permanent resident who has no documentation, and who has not lost his status, may apply to a consular officer abroad for a special immigrant visa.

We are also proposing a change in the provisions relating to the expulsion of excluded aliens. The present section 237 of the Immigration and Nationality Act only permits the deportation of an excludable alien to the "country whence he came." Judicial decisions have interpreted this provision to mean the country where the alien had his last place of abode. When that country does not recognize the alien's right to return, the United States Government has no discretion to apply to a second country which may be willing to accept the alien as a deportee. In contrast, where an alien illegally in the United States is ordered arrested and deported following a deportation hearing, section 243(a) of the Act provides that if the country first designated will not accept the alien, application may be made to other countries. This amendment would provide similar options with respect to aliens who have been ordered excluded and deported. It will also eliminate the confusing term "whence he came" and make it clear to which country deportation may initially be sought.

The streamlined exclusion proposals I have just discussed will be applied in normal situations. In emergency situations, such as that recently experienced with the Mariel boat lift and the influx of Haitians into South Florida, other procedures would apply under our proposed emergency legislation. Under this proposal, the President would be empowered to declare that an emergency existed and prohibit the entry or exit of vessels and aircraft which are carrying, or will be used to carry, undocumented aliens to the

United States. Aliens intercepted during the emergency would not be entitled to a hearing before an immigration judge, and special provisions relating to asylum procedures, and deportation would apply. Judicial review would be foreclosed. As to the latter, the elimination of judicial review is a significant step and has been proposed only after serious consideration. The law is clear, however, that those aliens seeking admission to the United States only have the due process rights which Congress decides to grant. Knauff v. Shaughnessy, 338 U.S. 537 (1950).

Finally, we are proposing changes in the appeal time available to an alien to appeal orders of deportation or administrative decisions. Under the current section 106(a) of the Act, an alien has six months to appeal from an order of deportation. This means that many deportable aliens postpone their appeal for five months or more, and then submit a frivolous appeal, which gains them an automatic stay of deportation. With the existing backlogs in the courts of appeal, the net result is to award a deportable alien extra years in the United States. We propose to shorten this appeal time to 30 days. This shortened period will speed up the deportation process, and will not adversely affect an alien's legitimate defense to a deportation order.

We also propose to amend the present section 279 of the Act to provide for a 30-day appeal period to contest an administrative action arising under the immigration statutes or regulations. Under the present provision, deportable aliens have been able to frustrate the deportation process. This is done by filing suit contesting administrative actions such as a denial of student reinstatement, after the deportation process has been completed, and after they have received final orders of deportation. The proposed 30-day appeal period will eliminate this practice to a great degree, and will also be consistent with the proposed section 106(a).

This completes my presentation on issues relating to asylum, exclusion, and appeal processes. I would be happy to entertain any questions the Subcommittee may have.

Senator SIMPSON. Thank you very much, very helpful. Mr. Palmer, please.

STATEMENT OF STEPHEN E. PALMER, JR., ACTING ASSISTANT SECRETARY, BUREAU OF HUMAN RIGHTS AND HUMANITARIAN AFFAIRS, DEPARTMENT OF STATE

Mr. PALMER. Thank you, Mr. Chairman.

I want to underline the great and continuing concern which the Department of State has with regard to asylum laws and procedures.

As you know, the Department of State has played a formal role in the processing of asylum claims for only about a decade when, following the incident of the Lithuanian seaman, the President directed appropriate departments and agencies under the coordination of the Department of State to take steps to bring every echelon of the U.S. Government which could possibly be involved with persons seeking asylum a sense of the depth and urgency of our commitment.

The Bureau of Human Rights and Humanitarian Affairs and its predecessor bureaucratic entities have been doing this work for the last 10 years, reviewing cases and giving our best advice on special considerations, including human rights situations in the pertinent countries, so that the INS decision on these cases could be made with the best information available.

We are concerned that case by case a review in light of those considerations for most claims be continued. However, in light of the tremendous numbers which Ms. Meissner has indicated, we will need to alter our involvement somewhat.

Just a few numbers on cases which have come to us for review. In 1971, the first year, only 441 and that has progressively gone up to the point where we have thus far this year more than 20,000 applications to review.

We have been able to assign additional staff to the asylum division. We are reducing the average turn-around time, but the backlog is still fairly significant, mainly because of the decision not to process any of the Iranian claims during the time that our hostages were being held in Iran.

We believe that efficient means of cooperating with the INS can be arranged which will enable us, with them, to maintain the quality of the attention which asylum claims now receive, but will ensure their more expeditious processing. Certainly, the claimants themselves should benefit from having their status clarified much more rapidly than under the present system.

We will work very closely with the proposed new corps of INS asylum officers to insure that they have continuing current information on relevant conditions abroad. We will help, with the service, to engage other relevant government agencies and international organizations which have expertise in such matters.

We propose specifically to continue to provide advisory opinions on three categories of cases: those of especially complex or sensitive nature; certain categories of special interest identified by the Service and ourselves, and any others which the asylum officers deem doubtful and wish to refer to us.

So, we are confident that the Department of State and the Service will work together to assure that each application is given every consideration consistent with our international treaty obligations and our domestic laws and regulations, as well as our longstanding commitment to offer refuge to those fleeing persecution.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Palmer follows:]

PREPARED STATEMENT OF STEPHEN E. PALMER, JR.

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I APPRECIATE THIS OPPORTUNITY TO APPEAR BEFORE THE COMMITTEE TO DISCUSS OUR ASYLUM LAWS AND PROCEDURES -- A SUBJECT WHICH IS OF GREAT CONCERN TO THE DEPARTMENT OF STATE.

ALTHOUGH THE STATUTORY RESPONSIBILITY FOR ASYLUM LIES WITH THE ATTORNEY GENERAL AND IS DELEGATED BY HIM TO THE IMMIGRATION AND NATURALIZATION SERVICE, THE DEPARTMENT HAS PLAYED A ROLE IN THE CONSIDERATION OF ASYLUM CLAIMS FOR THE PAST TEN YEARS. PRIOR TO THAT TIME, THE DEPARTMENT PLAYED NO FORMAL ROLE IN THE DECISION-MAKING PROCESS. THE UNFORTUNATE INCIDENT INVOLVING A LITHUANIAN SEAMAN NAMED SIMAS KUDIRKA, HOWEVER, LED THE PRESIDENT OF THE UNITED STATES IN 1971 TO DIRECT "APPROPRIATE DEPARTMENTS AND AGENCIES OF THE UNITED STATES GOVERNMENT, UNDER THE COORDINATION OF THE DEPARTMENT OF STATE, TO TAKE STEPS TO BRING TO EVERY ECHELON OF THE UNITED STATES GOVERNMENT WHICH COULD POSSIBLY BE INVOLVED WITH PERSONS SEEKING ASYLUM A SENSE OF THE DEPTH AND URGENCY OF OUR COMMITMENT." FOLLOWING ISSUANCE OF THE PRESIDENT'S DIRECTIVE, IT WAS DECIDED THAT IT WOULD BE HELPFUL TO THE INS IN REACHING ITS DECISIONS ON ASYLUM CLAIMS TO HAVE THE VIEWS OF THE DEPARTMENT OF STATE ON DOUBTFUL ASYLUM REQUESTS. THE IMPLEMENTING REGULATIONS OF THE 1980 REFUGEE ACT REQUIRE THAT ALL CASES BE REFERRED TO THE BUREAU OF HUMAN RIGHTS AND HUMANITARIAN AFFAIRS. THE DEPARTMENT OF STATE IS CONSIDERED THE APPROPRIATE AGENCY OF THE GOVERNMENT TO COMMENT ON CONDITIONS WITHIN THE COUNTRY FROM WHICH ASYLUM WAS SOUGHT, AND ON ANY SPECIAL ASYLUM OR HUMAN RIGHTS CONSIDERATIONS INVOLVED. THE DEPARTMENT COULD HELP ASSURE THAT SUCH FACTORS WOULD BE TAKEN FULLY INTO ACCOUNT.

OUR CONCERN THAT EACH INDIVIDUAL CASE BE CAREFULLY REVIEWED IN LIGHT OF THESE IMPORTANT CONSIDERATIONS REMAINS AND OUR CONTINUED ROLE IN THE ASYLUM PROCESS WILL BE CODIFIED IN THE IMPLEMENTING REGULATIONS OF THE REVISED SECTION 208 OF THE

IMMIGRATION AND NATIONALITY ACT. IN LIGHT OF THE FOLLOWING FACTS, HOWEVER, THE NATURE OF THE DEPARTMENT'S INVOLVEMENT WILL BE SOMEWHAT ALTERED.

IN 1971 OUR VIEWS WERE REQUESTED ON 441 CASES. IN 1977, THERE WERE 1,616 REQUESTS. IN 1980, OVER 15,000 WERE RECEIVED AND, THUS FAR IN 1981, 20,038 ASYLUM APPLICATIONS HAVE BEEN RECEIVED FOR REVIEW BY THE BUREAU OF HUMAN RIGHTS AND HUMANITARIAN AFFAIRS. WE HAVE ASSIGNED ADDITIONAL STAFF TO THE ASYLUM DIVISION, RESULTING IN A REDUCTION OF THE AVERAGE ASYLUM APPLICATION "TURN-AROUND" TIME OF A YEAR AGO. A SIGNIFICANT PROPORTION OF THE IRANIAN CLAIMS WHICH BECAME BACKLOGGED DURING THE EXTENDED HOSTAGE CRISIS HAS ALSO BEEN ACTED UPON DURING THE PAST 6 MONTHS.

HOWEVER, IN LIGHT OF THE TREMENDOUS NUMBER OF CASES MRS. MEISSNER HAS INDICATED ARE PRESENTLY IN THE SYSTEM AND THE CHARACTER OF MANY CLAIMS BEING FILED, WE BELIEVE THAT A MORE EFFICIENT MEANS OF COOPERATING WITH THE INS CAN BE ARRANGED. WE WILL MAINTAIN THE QUALITY OF ATTENTION ASYLUM CLAIMS RECEIVED, BUT WILL ENSURE THEIR MORE EXPEDITIOUS PROCESSING. ASYLUM CLAIMANTS WILL BENEFIT BY HAVING THEIR STATUS CLARIFIED MORE RAPIDLY THAN UNDER THE PRESENT SYSTEM.

BUREAU OF HUMAN RIGHTS ASYLUM STAFF WILL WORK WITH THE PROPOSED NEW CORPS OF INS "ASYLUM OFFICERS" TO ENSURE THAT THESE OFFICERS HAVE CURRENT INFORMATION ON RELEVANT CONDITIONS ABROAD. OTHER GOVERNMENT AGENCIES AND INTERNATIONAL ORGANIZATIONS WHICH HAVE CONSIDERABLE EXPERTISE IN SUCH MATTERS WILL ALSO BE CONSULTED TO ENSURE THE BROADEST POSSIBLE INFORMATION BASE. IN ADDITION, THE BUREAU WILL CONTINUE TO PROVIDE ADVISORY OPINIONS ON INDIVIDUAL CASES WHICH ARE: 1) OF A PARTICULARLY COMPLEX OR SENSITIVE NATURE; 2) WITHIN CERTAIN CATEGORIES OF SPECIAL INTEREST IDENTIFIED BY STATE AND INS, AND 3) ANY OTHERS DEEMED DOUBTFUL AND REFERRED TO US BY INS. THESE OFTEN REQUIRE CONSULTATIONS WITH OUR OVERSEAS MISSIONS.

I AM CONFIDENT THAT THE DEPARTMENT OF STATE AND THE IMMIGRATION SERVICE WILL WORK TOGETHER TO ENSURE THAT EACH ASYLUM APPLICATION IS GIVEN EVERY CONSIDERATION CONSISTENT WITH OUR INTERNATIONAL TREATY OBLIGATIONS, DOMESTIC LAWS AND REGULATIONS, AS WELL AS OUR LONGSTANDING COMMITMENT TO OFFER REFUGE TO THOSE FLEEING PERSECUTION.

I WILL BE PLEASED TO ANSWER ANY QUESTIONS YOU MAY HAVE.

Senator SIMPSON. Thank you very much.

Let me ask some questions. First, Ms. Meissner, why do you feel that asylum adjudication should be a separate procedure from other adjudication claims?

Ms. MEISSNER. In many ways this proposal puts asylum adjudications into a position of greater similarity with other adjudications that we do.

The proposal to separate the asylum decision from the exclusion and deportation decision is an attempt to eliminate the kinds of incredible delays that have come about by allowing the asylum decision to be reviewed over and over again by various levels of appeals within the judicial system.

Senator SIMPSON. That is a very vexing thing, am I right, that these asylum procedures are, as you said, very cumbersome, that there are really about five stages there?

First you have the initial asylum decision by the district director. Then, if negative or if the claimant first pleads asylum after the entry into the United States, we have then an exclusion proceeding before the immigration judge where asylum is raised as a defense.

Then we have a review of any negative determination by the Board of Immigration Appeals, which is a unique body in itself. The people staffing it are outside of the administrative law judge area. Then we have a habeas corpus review in the U.S. district court. A review, then, of the district court determination by the circuit court of appeals as I understand it. Is that correct?

Ms. MEISSNER. That is essentially correct.

Senator SIMPSON. Each one of those proceedings except the last is a de novo proceeding.

Ms. MEISSNER. I believe so, yes.

Senator SIMPSON. That is an extraordinary litany of tangled legal efforts to me. How do you assess that? You already have indicated it works very poorly. How did we get to that point, and how do we get out of that thicket?

Ms. MEISSNER. How we got to that point is a rather long and complicated story, but it has to do with a variety of attempts on the part of the government to put fairness into a system which has developed quite recently.

As Mr. Palmer indicated, it is only since 1972 that asylum has formally been part of the Immigration Service's operating procedures. Before that, it was just a very rare and informal circumstance that people here would claim asylum. Throughout the 1970's it has grown incrementally during the last 1½ or 2 years it has exploded.

Prior to that, various steps were taken to formalize the process in relation to the U.N. protocol and various pieces of litigation that we were involved in domestically. But the current procedures lend themselves to a rather protracted judicial process not suited for large numbers.

Senator SIMPSON. I believe they do. What I think is most frustrating for anyone who may have practiced law, especially administrative law, we really have a situation which is obviously unwieldy, but we really have a situation where—if there is such a phrase for determination—more due process going to that person than would

go to the ordinary citizen in some cases—a layering and layering of protective de novo procedures.

Ms. MEISSNER. The situation we have is one where the fullest extent of due process is being given under circumstances that probably do not require that level of protection. Going back to your earlier point of de novo review, the circuit court review would not be de novo review, nor would the habeas review.

Nonetheless, there are several other possibilities in the system that you outlined where there is de novo review. Our proposal simply tries to put this into perspective and grant fairness a system that allows for a hearing and a case to be made when it is a bona fide case; but does not extend to the point where the procedures can become abused and dilatory, which we believe is the case at the present time.

Senator SIMPSON. Yes. I think the committee, or certainly I do share that view that it is being abused.

You say the habeas corpus review is not a de novo process in this existing litany?

Ms. MEISSNER. Not de novo on the asylum issue.

Senator SIMPSON. How will this asylum adjudication officer be selected, what are your views? Would this be an immigration judge under another name, or will it be a separate Civil Service category?

Ms. MEISSNER. It would be a separate Civil Service category, a new occupational group, within INS. We would recruit people who have foreign language capabilities, who have a strong liberal arts-foreign affairs background. It would be high-graded officer position with extensive training required. We would view it as an occupation to be recruited largely from outside of the Government, rather than from within our current ranks.

Senator SIMPSON. And would that recruitment and selection process be a much more complex one than it is now in the present with, say, immigration judges?

Ms. MEISSNER. Our proposal really has not looked at immigration judges as an analogy. We are looking at a professional officer, to be involved in an interview adjudications setting, not a judicial setting.

Senator SIMPSON. We will be interested as we pursue that as to how that person will be best described from an administrative, or professional, or judicial standpoint. We will work together on that.

Why have we not provided for some form of Federal judicial review in asylum officer adjudication? I say that because of the case, some years ago, a 1952 case, where they said that was not required, and the judges have taken great glee in smashing that one down over the course of the latter years.

I think there is obviously an active judicial interest in the field and a continual skepticism expressed by the judiciary in their decisions. Do you feel still that no Federal judicial review is appropriate there?

I would like to discuss that, have your comments.

Ms. MEISSNER. We have discussed the issue of judicial review extensively. It is nearly impossible to give one level of judicial review, and that is why we have come forward with a proposal that eliminates judicial review but allows instead for certification to the Attorney General.

To have one level of judicial review would require that one go directly from the asylum officer's decision to the circuit court. It is rather unrealistic to ask a Circuit Court of Appeals to look at this kind of decision.

If one were to go to the district court as the review body for an asylum officer decision, then automatically the district court decision could be reviewed by a circuit court. So, one very quickly begins to back into the situation that we have at the present time, and that is a multilayered appeal system.

With an asylum officer of special background and very specialized training, we believe we can have a fair process based on an extensive interview in a nonadversarial situation.

With correct monitoring and oversight within the Immigration Service and the Justice Department, erroneous decisions or particular problems that might arise can be dealt with administratively. Judicial review will not be required.

Senator SIMPSON. I think that would be good if there is a perception that those cases are being pursued in a manner which is humane and caring. I think that we want to be on guard as to how hostile the judiciary feels about that previous procedure where discretion is used, and there is certainly an element of those who want to exercise restraint on the administration.

Ms. MEISSNER. Mr. Chairman, on the question of judicial review, one might use the analogy of refugee processing overseas and consular officer decision overseas. In both circumstances, decisions involving entry into the United States are made without judicial review. Consular officers screen immigrant and nonimmigrant visa applications and INS officers process refugees for admission to the United States. These are administrative decisions, with no judicial involvement. Our feeling is that it works effectively and that it is an appropriate analogy.

Senator SIMPSON. Just one further question, and then Senator Grassley may have questions.

Would you please explain the interdiction program to us briefly? Even though that may be a bit competitive, for this record I think it would be helpful. How will that adjudication take place at sea?

Would the asylum officer be on the Coast Guard cutter, vehicle, in the interdiction program, and would that be the same type of officer or the same position as the asylum officer who would consider asylum applications on the mainland?

Ms. MEISSNER. The immigration officers that are on the Coast Guard cutter are immigration inspectors who have had considerable experience in processing refugees. They are not entirely similar to what we would propose as asylum officers. We would hope that our asylum officers would be a new category of officers with extensive training.

The officers presently involved in the interdiction effort are not adjudicating applications on the high seas. The responsibility of the immigration officers is to identify people who have a possible claim to refugee status.

Those people will then be brought back to the United States for a full review of their claims—the adjudication itself will be made here in the United States. The INS officer's responsibility on the

ship is to insure that we are in compliance with the U.N. protocol on refugees and resettlement.

Senator SIMPSON. So, in other words, it is just a separation process that you describe it as.

Ms. MEISSNER. Yes. Adjudication will take place in the United States.

Senator SIMPSON. Based upon interviews of several minutes, 10 minutes?

Ms. MEISSNER. On brief interviews of about 5 minutes.

Senator SIMPSON. Then going on to a further type of investigation or examination where there is sought to be determined a different status; is that right?

Ms. MEISSNER. That is correct.

Senator SIMPSON. Any questions, Senator Grassley, my colleague from Iowa?

Senator GRASSLEY. Yes; I will take up where you left off on the subject of interdiction. The Miami Herald in an editorial on October 2, said that that program was costing \$1 million a month. Is that an accurate figure?

Ms. MEISSNER. I cannot verify the figure. It is essentially a Coast Guard cost and the figures are not available to me.

Senator GRASSLEY. Have you seen some figures on the potential cost?

Ms. MEISSNER. I have not, but we can certainly supply those.

Senator GRASSLEY. Is there any question about the President's authority through administrative decisions to proceed as he has with interdiction, as opposed to Congress passing legislation on that point?

Ms. MEISSNER. We would like to see legislation that authorizes interdiction. In fact, we have included that in the immigration emergency legislation.

At the same time, we believe there is presently sufficient authority for the President to proceed as he has, and that is the reason for the proclamation and the Executive order.

Senator GRASSLEY. Did the proclamation and Executive order refer to legal and constitutional authority?

Ms. MEISSNER. Yes, it did.

Senator GRASSLEY. It did. But there has got to be some doubt about whether the President really has the power or it would not be suggested in the legislation, would it?

Ms. MEISSNER. We believe there is sufficient authority to proceed the way we have proceeded. However, the authority under which we have undertaken interdiction is general authority that has to do with the responsibilities and rights of the President to protect the borders of the country. That is why in the immigration emergency legislation we are proposing a specific articulation of that authority with regard to interdiction.

Senator GRASSLEY. Is the legislation meant to go beyond what the President currently has authority to do?

Ms. MEISSNER. Let me refer that question, if I might, please, to Paul Schmidt, from our general counsel's office.

Senator SIMPSON. Yes, would you?

Mr. SCHMIDT. I think the legislation would give the President in some emergency situations authority beyond what he has exercised

up until now, such as taking steps to actually prevent departures from the United States by anybody who might be intending to go to a foreign country. But that authority could be exercised only in the event the President declared an emergency.

Senator GRASSLEY. Ms. Meissner, in your testimony you referred to 3,000 applications for asylum in 1978, rising to 53,000 today.

Do you expect the rate to keep increasing?

Ms. MEISSNER. We have no reason to believe that it will not.

Senator GRASSLEY. How many new hires will be necessary to form the new corps of INS asylum officers?

Ms. MEISSNER. We have not developed a fixed number at the present time. That is something under discussion with OMB.

However, we are talking about the ability to handle a caseload of about 50,000 a year.

Senator GRASSLEY. Do you have an estimated cost on that?

Ms. MEISSNER. We have some estimated costs, but they are not sufficiently refined for us to present them at this time. We will augment the record with that information.

Senator GRASSLEY. When will the new procedure go into effect?

Ms. MEISSNER. After the legislation passes we would hope for a period of perhaps 60 to 90 days in order to put the new procedures into effect.

Senator GRASSLEY. So, there is nothing you can do along that line until the legislation is passed.

Ms. MEISSNER. That is correct.

Senator GRASSLEY. Mr. Palmer, in your testimony you indicated that as a result of assigning additional staff to the Asylum Division, that the turn-around time of the applications has been reduced. How long did it take to review an asylum application a year ago, and what is the time period today?

Mr. PALMER. Mr. Senator, I meant to indicate that the turn-around time is to a large extent a function of a wildly fluctuating case load. We still have a big backlog of the Iranian claims. Some of those we have not yet gotten to are a year old.

Applications from certain regions we can, I think, handle at an average of a couple of months. So, it is hard to fix any precise average. But the backlog is being constantly reduced, despite the large numbers coming in now.

Senator GRASSLEY. Well, does that mean that the larger the case load the less meticulously they are reviewed; is that what you are saying?

Mr. PALMER. No, absolutely not. What it does mean, the larger the case load, the more personnel we—by one means or another, TDY or overcomplement—attach to that work. The care remains, I am convinced, of a very high quality.

Senator GRASSLEY. As you stated, in 1971 your reviews were requested on 441 cases. In 1981, the Department has received 20,000 cases for review. Is that work load due to a large increase in the number of applications, or merely due to your increased role under the 1971 Presidential directory?

Mr. PALMER. Well, it is due to the increase of the total case load we are receiving from the Service, and the fact that at present we are receiving all cases. We do not think it is necessary or desirable

for State to have to review a relatively large number of what we call frivolous claims.

We will be working with the Service to work out a way so that the processing will still involve us, in cooperation with the Service, in those cases which appear as to be possibly meritorious and about which there is some reasonable doubt.

Senator GRASSLEY. The last question that I am going to ask you is one that I tried to get witnesses in Des Moines, Iowa, on Friday to speak to when we had a hearing on the refugee situation there.

You obviously know about the controversy surrounding the status of those claiming refugee status from Indochina. That controversy centers around those claiming that they are fleeing for political consideration or whether they are fleeing for economic conditions in the respective countries.

How does this situation, the one in Indochina, compare to the situation of those claiming asylum from Haiti?

I might say, too, I did not get an answer to my question because they were not familiar with the difference, they have just been dealing with the people from Indochina.

Mr. PALMER. Well, basically the answer is very simple, the conditions of life, the general conditions of life in Haiti and the Indochinese States are really different. There continues to be, I think, a valid presumption that persons fleeing the Communist regimes of Indochina in the vast majority can be said to have genuinely political fears.

If one leaves, say, Vietnam illegally and is returned, or if one is apprehended while attempting to escape, there is almost automatically a rather lengthy period of imprisonment involved. That is not the case with Haiti. Returnees are not persecuted or prosecuted.

Senator GRASSLEY. Would what you are saying, though, be true in regard to at least the initial decision by the hearing officer or the adjudicatory officer there who originally determined sometime during the spring that many of the people were fleeing Indochina for economic purposes, and then, of course, that was later overruled by the Justice Department. Was his consideration that the economic reasons were any different in Indochina than in Haiti?

Ms. MEISSNER. You are talking about the motivation of the migrants?

Senator GRASSLEY. Yes, I am. You know, we have a situation where there was a determination that some of the people fleeing Indochina were fleeing for economic reasons. That was overturned by the Justice Department.

I am trying to make a determination through my questioning whether or not there is a consensus of what economic reasons are as opposed to political reasons, and whether that is uniformly administered in regard to those people fleeing all countries, or whether there is a separate determination.

Ms. MEISSNER. Whether or not the motivation for leaving is economic or political clearly can become murky.

But in the case of the Haitian-Vietnam situation it turns on the issue of safety once returned to their homelands more than on the initial reasons for leaving. In the case of the Indochinese, our view is that a large share cannot return safely, whereas in the case of

Haitians we do not have concrete evidence that they are systematically persecuted if they do return.

Senator GRASSLEY. I have one more question, but I still need to follow up on this question.

Has there been an adequate investigation in Haiti to know that what we surmise is the truth, that there is not any political persecution of those who have left the country?

Ms. MEISSNER. There have been very few returns to Haiti in the last several years. We have been, as you know, tied up in litigation that effectively prevented returns to Haiti.

If we are able to return people to Haiti, either through exclusion hearings in the United States or through an interdiction program on the high seas, we will be monitoring these people and should be getting some information.

Senator GRASSLEY. So, there has been no test, in effect.

Ms. MEISSNER. There was a test, but it is now several years out of date.

Senator GRASSLEY. Then my last question is to you, Ms. Meissner. In terms of interdiction, if a person is determined not to have a possible claim to asylum, what steps will INS take to insure that that person returns to their country?

Ms. MEISSNER. In the case of interdiction, the boat will be returned to the country. In this case, because we only have an agreement right now with Haiti, it is to Haiti. We will be monitoring those people who are returned to find out what happens.

Senator GRASSLEY. Has there been any successful return of boats? In other words, successful interdiction or determination?

Ms. MEISSNER. No. The cutter has at sea for only a week and we have not had an interdiction, nor have there been any arrivals.

Senator GRASSLEY. Thank you.

Senator SIMPSON. That is certainly an interesting statistic, the latter one. There have been no arrivals of any kind?

Ms. MEISSNER. My information is that there have been no arrivals from Haiti. One boat did land in Florida but it came from the Bahamas.

Senator SIMPSON. If anyone here on the panel has any other information, we would be pleased to have it.

Mr. PALMER. I was just observing, Mr. Chairman, my understanding that the cutter has been on station after refueling and so forth only since Sunday. So, it has only been a matter of a few days.

Let me say at this juncture that the chief of our Bureau's Asylum Division is aboard the cutter to observe and help advise the immigration officers who are there. We all thought it would be useful to have an experienced political asylum officer aboard at the first such venture and perhaps from time to time thereafter.

Senator SIMPSON. Well, let me ask this, Mr. Palmer. We are aware that "suitable arrangements" have been made with the Government of Haiti to implement the interdiction program or else we would not have entered upon it. We have agreeing nations there in that situation.

One of the agreements of the agreeing nations is that when we do interdict and return them, that they will not be persecuted. Is that not correct?

Mr. PALMER. That is correct.

Senator SIMPSON. How will we monitor that?

Mr. PALMER. Mr. Chairman, the arrangements are that the Haitian National Red Cross Society personnel will be receiving the returnees and they will give some modest sustenance and the cost of transportation back to their homes.

Personnel from our embassy will be among those in the reception committee, if you will, and we will be able to follow through our many contacts in the Haitian society what in fact ensues.

But we have official and repeated assurances from the Government of Haiti that not only will there be no persecution of those who are returned, but that they will not suffer any prosecution for having left illegally.

Senator SIMPSON. Are there Government negotiations, agreement situations, on interdiction with other countries?

Mr. PALMER. Sir, the problem in terms of numbers has been, and presumably would continue to be were it not for such steps as we are taking, from that one country. Should significant flows, maritime flows, develop from other countries in that region, obviously we would seek similar arrangements with those governments.

Senator SIMPSON. A couple more questions. In the present scheme of things, by regulation, all asylum determinations or requests for asylum are referred to the State Department. That seems to be a rather ponderous process itself. What changes in that procedure would you think might be appropriate?

Mr. PALMER. Well, at each end of the spectrum there are cases which we do not think there is any reason for us to review and advise the Service on. At the one end, there are the manifestly frivolous claims where no evidence of any convincing nature is advanced to support the claim.

At the other end of the spectrum there are fairly clear cases of meritorious claims, and if the Service decided to grant those claims we do not need also to be in the act.

I think there is a middle group we would want to be apprised of; cases which might be sensitive internationally. As one who has reviewed many, many cases personally myself, I know how difficult it is to be certain about one's decision or one's feeling about quite a few cases. That, I am sure, obtains also in the Service. So, those which they consider doubtful we would be happy to review.

Senator SIMPSON. Let me ask you one final question. Do you know what the backlog is, do you know what has happened with asylum as a whole? How ineptly we handle our role as a country of first asylum, those are things we do know.

How will we expect to handle this 95,000 asylum-claim backlog, how will that be cleared?

Mr. PALMER. Well, we of course do not have that number. Ms. Meissner, your estimate is, I believe, there are some 65,000 now?

Ms. MEISSNER. Our estimate of the backlog is 65,000, this does not negate the point because it is still a substantial number of cases that have to be handled.

Our hope would be that with new legislation and an asylum officer cadre we could prospectively keep up with the traffic and then, under the same circumstances, be working off this backlog. Clearly the backlog would be subject to the regulations that presently exist

and would require a finding that is reviewable in the way that the regulations presently read.

But we would hope to keep up prospectively and at the same time work off this backlog.

Senator SIMPSON. Has that figure changed because of the adjustment in numbers with regard to the Cubans?

Ms. MEISSNER. I am not certain where the 95,000 number comes from.

Senator SIMPSON. I think the information is correct as I reviewed it from records of various government sources. But it may be that they adjusted out of there approximately 30,000.

So, could you check that for me, please?

Ms. MEISSNER. Yes, that is correct. I am sorry. There were 30,000 Cuban cases that were registered in the system prior to the entrant status decision and we consider them moot at this time.

Senator SIMPSON. And how many people do you have turning around the backlog, doing the work?

Ms. MEISSNER. Within the Immigration Service we cannot give you a definite number because our inspectors handle asylum cases along with more than 30 other types of adjudications.

Senator SIMPSON. How many in the State Department handle the backlog process?

Mr. PALMER. We have now three full-time permanent officers; three experienced retired Foreign Service officers who are working on 60 percent time, and three TDY officers; that is a total of approximately nine full-time officers. In addition, we have five full-time clericals.

As I indicated, we have finally in the last few months reached the point where the trend has started to be positive, that is, we are discharging more cases than we are receiving and the total that we are holding is going down steadily.

If I may just very briefly be a little more specific about the kinds of cases I am sure the Service would want us to review. They would certainly include foreign officials, officials of foreign governments. They would certainly include cases where our embassies might well have relevant information which we would seek.

Senator SIMPSON. If you would please furnish us the figures of how many are cleared per year. I think the previous testimony here shows something like 2,500 being processed. If you have different figures, I would like those for the record.

Mr. PALMER. Very well. I can furnish them right now, if you would like.

Senator SIMPSON. I would like to know, is that figure correct or incorrect?

Mr. PALMER. Thus far this year we have issued to the INS 14,091 advisory opinions. In all of last year, we advised on 5,132.

Senator SIMPSON. So, the action has picked up.

Mr. PALMER. Certainly.

Senator SIMPSON. I have no further questions. I very much appreciate your participation. Ms. Meissner, thank you for your capable and effective testimony. Thank you, Mr. Palmer.

Mr. PALMER. Thank you, sir.

Senator SIMPSON. You have been very helpful to us.

The next panel will be the lawyers' panel, and that consists of Dale Swartz, executive director of the National Coalition for Refugee Reform; Ira Kurzban, Esq.; Dale M. Schwartz, Esq., and Stanley Mailman, Esq.

If we can proceed with a little less gusto there, I would appreciate it. Yet, we will be perfectly patient until you are set up.

You realize what an awesome feeling of power this is, having been an attorney, sitting here now as judge and finding four of my fellow barristers out there—it does not feel like power, I can assure you.

I am very interested in what you will be telling us and so, let us proceed. Let us just go down this list as presented there—you know the time problem—and then we will get into some questions.

STATEMENT OF DALE F. SWARTZ, ESQ., MEMBER NATIONAL FORUM ON IMMIGRATION AND REFUGEE POLICY

Mr. SWARTZ. Mr. Chairman, again I appreciate the opportunity to testify before the subcommittee on this very important issue. I will of course summarize my testimony which does include a number of specific recommendations and analysis of some of the proposals that are now on the table.

Before beginning I would like to express my appreciation to the Institute of Public Representation at Georgetown University that substantially has prepared the written testimony that I am giving today.

In my oral remarks I would like to concentrate not so much on specific proposals but the character of the decision that Congress faces in this area.

I believe that interdiction is a most brave step that the U.S. Government has decided to take to deal with the movement of people. I am afraid that in my mind it is not very far removed from being prepared as a country to shoot people on the borders to stop them from coming in. The President has authorized the use of force. I am sure that force will be avoided at all cost in the interdiction process, but symbolically, as a matter of principle, I think interdiction is a very serious matter.

As I have before, I would point out the last time the United States turned away boats of people seeking refuge was in the late 1930's, and at that time Nazi Germany represented to the world that Jews were economic migrants, leaving for economic reasons, and the U.S. Government adopted that characterization and justified turning away their boats.

As recently as 1979, the United States vigorously condemned the practices of Malaysia and Thailand of turning away boats carrying Indochinese. So, the international implications, the ethical questions, should be kept very much in mind as we consider the interdiction question.

I would like to, if I could, in my oral testimony pick up on a question that Senator Grassley raised regarding the facts because here again, I do not see how it was possible for the Congress to make practical, reasoned judgments about policies to gain control over migration unless they have a very accurate and comprehensive understanding of what the facts are.

I am consistently troubled by representations from State Department representatives, particularly as to the facts regarding Haiti.

Senator, there has been substantial testing of the question of what happens to Haitians who return to Haiti. As you may be aware, there was a major class action that was litigated in 1979 and 1980 called, *Haitian Refugee Center v. Civiletti*, before Federal Judge James King who was appointed by Richard Nixon in 1970—approximately a 7-week trial.

Most of the evidence presented related to the question of why people are leaving Haiti and what happens to them upon return.

This judge issued 70 pages of findings of fact on political and economic questions on Haiti. I would respectfully direct your attention to it as I think the most rigorous examination of the underlying factual issues regarding Haitian migration.

He found, totally contrary to the representation by the State Department, that indeed the Haitian Government had adopted a policy of persecuting those returned from abroad.

He heard testimony from at least five members of the Haitian security forces who testified that they received such orders and were engaged and participated in carrying them out, and that indeed unknown numbers of Haitians returned from the United States had suffered—and I am paraphrasing his opinion—arbitrary imprisonment, torture, and even death by starvation and disease in Haitian prisons.

So, in examining why it is people are leaving Haiti or what happens to them upon return in attempting to develop policies that may be in the national interest as well as lawful, I think we have to be very careful to be as accurate about the underlying facts as possible, and that the State Department's version, which in fact is suspect, has to be proven.

A couple of other general points. Again, I think interdiction and some of the proposals from the administration, for example to deny the courts jurisdiction to consider challenges to the processing of asylum claims, represent substantial departures from our tradition, from prior practices, and our commitment to the rule of law.

And that all of us involved in this process will, of course, be judged not only by the practical wisdom of the decisions to be made, but also their character.

I think the question of asylum procedure really is treating symptoms—that is the symptom of people leaving their homeland, arriving on our shores, who are seeking sanctuary.

The problem to be focused on in seeking solutions, it seems to me, first and foremost has to be, what are the conditions in Haiti; why are Salvadorans fleeing in such great numbers; is there not some causal relationship between the civil war and some of our foreign policy in Salvador, and the significant increase of people that have come from Salvador in the last several months, and what can we do as a government—in cooperation with other governments—and through the private sector to secure greater social justice and economic development in countries in this hemisphere who are sending people to us who are seeking asylum.

The debate should focus first and foremost on root causes and less so on procedures and symptoms, although we do have to deal with the problem of what are we to do when the people get here.

Along those lines, my written testimony makes some specific recommendations for streamlining the process while at the same time maintaining fundamental fairness. The question is not only what the procedures ought to look like, but how are they going to be applied.

We have had in the past, as you know, very complex procedures with a number of levels of appeal and procedural protections built in, and we still have litigation I am afraid because the law was not applied the way Congress had intended it to be applied.

Lawyers do not win lawsuits in big ways by and large unless they should. We certainly do not want a lawsuit like that on behalf of the Haitians unless the Government indeed has acted in a very extreme and unlawful fashion.

I think of great concern is not only how could these laws be changed and how could they be improved and streamlined, as making sure that they are applied in a lawful manner and as Congress intended.

The final point, a general point. In responding to those who arrive on shore seeking asylum I again think serious consideration ought to be given to an international model. The United States finances, supports, participates in U.N. or internationally run camps in other parts of the world. The only place we really do not do that is on our own shores. There may be a range of reasons why we cannot or should not. But I think it is worthy of a hard look and be somewhat more specific.

The United Nations in other parts of the world participates in care and maintenance of people seeking asylum, they run the camps. The legal questions, questions of humanity, questions of U.S. image in detaining people who arrive on our shores, may be somewhat different and less troubling if it were an international program rather than a U.S.-run program.

Suddenly the U.N. is involved in one fashion or another in adjudicating asylum claims. I think the involvement of the international community in that process creates not only the image but some sense of reality and fairness; and I think that is deserving some serious consideration.

Finally, the international community and the U.N. sponsor resettlement opportunities for those who are going to be deemed refugees, and repatriation of those who are deemed not.

I personally would feel somewhat more secure to the extent that if there is repatriation to El Salvador and others, if the U.N. and the international community were involved rather than simply the U.S. Government.

Let me stop there except to note that I have a number of problems with some of the answers the State Department representative gave, the group on the previous panel, on the question of assurances from the Haitian Government and monitoring the people who are returning.

We have been down this road before. Such assurances have been given before. Monitoring, it has been admitted by the State Department, is virtually impossible in the Haitian context.

Again, these specific issues are the subject of findings of fact by a Federal judge. I think that record is worthy of your consideration.

[The prepared statement of Mr. Swartz follows:]

THE PREPARED STATEMENT OF DALE F. SWARTZ

Mr. Chairman, members of the Subcommittee, my name is Dale F. Swartz and I am currently the Director of the Aliens Rights Law Project at the Lawyers' Committee for Civil Rights Under Law and founding member of the National Forum on Immigration and Refugee Policy. I appreciate the opportunity to appear before you this afternoon. The testimony I will present reflects my own opinion and does not necessarily reflect the position of any organization. I would also like to thank the Institute for Public Representation of Georgetown University Law Center for assistance in the preparation of my testimony.

Introduction

Persons fleeing repressive governments and life threatening situations are desperate and in fear for their lives. In seeking asylum in another country, these persons are faced with innumerable obstacles and unknowns. They have often abandoned a life-time homestead, business or trade, and even close family members. Their lives and futures are at stake when they make a plea for asylum.

The U.S. response to such pleas has at best been haphazard and at worst inhuman. Although we as a nation assert pride in our two hundred year history of accepting immigrants and reaping the benefits of their contribution, a closer look at the recent history of U.S. asylum policy reveals an unevenly applied and inadequate policy, with tragic consequences for persons the U.S. has returned to face persecution, and adverse effects on local communities and our world image.

We are now faced with serious dilemmas which are symptoms of our inadequate response to the Western Hemisphere's refugee problem. To deal practically with these problems requires a sober and sincere look at the underlying factors. It requires an approach that looks to the broader, international implications, and not only domestic concerns. Sensible, ethical solutions can occur only when the underlying reasons for refugee flight are honestly examined, and the

operations of the Department of State and the Immigration and Naturalization Service are viewed with a critical eye.

Most importantly, solving these problems requires a recognition of past failures in government processing of asylum applicants which have resulted in gross abuse of authority, denial of procedural rights, and dishonest fact finding and reporting. Recognizing these failures is not enough; we must prevent their repetition. The decisions that must be made require frank, sensible, comprehensive and ethical thinking and problem solving. In this regard, it is worth remembering that in the late 1930's the U.S. interdicted and turned away ships carrying Jews fleeing Nazi Germany. And as recently as 1979, the U.S. condemned as inhumane and illegal similar practices against Indochinese refugees.

Scope and Impact of Problem

The underlying issues in the asylum area are:

- (1) lack of accurate information on why refugees are fleeing, and treatment if returned to their homeland;
- (2) the numbers of persons coming directly to U.S. shores seeking asylum;
- (3) untapped opportunities for international assistance;
- (4) lack of a uniform policy;
- (5) uneven application of policies now in effect; and
- (6) unfairness in the processing of asylum applications.

The lack of resolution of these issues manifests itself in a host of problems. Exorbitant expenditures, backlash against refugees within local communities, insensitivity to human lives, inexcusable delays in processing, severe strains on state and local resources and a tarnished U.S. image are the results of the indecision inherent in our policy. These problems have recently been highlighted by the increased number of refugees arriving from Haiti, Cuba and El Salvador.

The first step in reaching workable solutions is a broad and honest look at the larger picture. Why are people fleeing their

homeland and in such great numbers? The search for an answer to this basic question must not be limited to politically motivated assessments by the State Department. In a recent case involving Haitian refugees, U.S. District Court Judge King concluded that a State Department Study Team had "failed to obtain accurate, objective information on the treatment of returnees and failed to comprehend the implications of that which they did learn."¹ The State Department Team had actually traveled to Haiti to investigate the political climate in connection with Haitian refugees' claims for asylum. The resulting report backed their previous attitude: Haitian refugees were not persecuted upon return. Judge King, after a 25 page analysis, characterized this report as "unworthy of belief." This type of predetermined "investigatory" work by the State Department is useless in attempting to plan for and respond to the asylum problem, and in examining policies which might alleviate root causes.

Honest and accurate fact finding is vital to informed decision-making. Only with accurate information may decision-makers realistically estimate costs and choose practically among alternatives. Only with honest, in depth reports, may the international community be notified and encouraged to assist in overall planning and problem solving. An international approach and concern with root causes make sense when we look at the astounding cost on the federal level for 1980 of over \$900 million dollars for Cuban and Haitian matters.

Just as important, if not more important, as the excessive costs incurred by the federal government are the financial and social strains placed on state and local governments. In testimony before the Senate Judiciary Committee, a spokesman for the National Associations of Counties noted:

1 Haitian Refugee Center v. Civiletti, No. 79-2086-Civ-JLK, slip op. at 79-80 (S.D.Fla., July 2, 1980).

Although the Federal Government is responsible for determining national immigration and refugee policies, it is county government which must deal on a daily basis with the effects of these policies.²

The state and local governments must be able to plan for resettlement of refugees. With an orderly flow of accurate information, decision-makers on all levels will function in a less pressured setting, and will be better able to explain why the refugee are there. Where large numbers of refugees have been placed in communities with no immediate or long term government plans for their dispersion or assimilation, the decision-making process becomes skewed by the backlash within the community. A government that establishes an effective asylum policy will engender cooperation and a natural, compassionate response by its citizens. Moreover, with the eyes of the world upon the U.S., decisive, humane leadership inspires like reactions by other governments.

The second step in the search for workable solutions requires concentration on the individual refugee and his interaction with various designated agencies. While noting the difficulties facing localities in times of refugee influx, a NACO spokesman has expressed concern for the individuals involved in the process, stating that "the asylum applicants should also be treated as humanely as possible. ..We believe it is inhumane to keep persons for months and even years in detention facilities without just cause." We must, in short, look at the individual aspects of the overall problem with an eye toward fairness, humane treatment, and even handed application while seeking solutions which impact on the domestic as well as the international community.

In the initial treatment of asylum applicants, we must devise and enforce a uniform standard which is applied in a nondiscriminatory manner. Such a system will foster respect for our laws, encourage those who have gone underground to surface, and ultimately

2 127 Cong. Rec. (daily ed. July 31, 1981).

reduce processing time and cost. A benefit of reducing processing time will be the reduction in the need for detention facilities and the problems which attend such sites.

These goals, however, must be achieved without sacrificing the procedural due process rights of individual asylum applicants. A fair hearing for all individuals is guaranteed within our judicial framework and recognized under Article 32 of the U.N. Protocol. Judge King notes in his opinion that the Haitian refugees sought justice and freedom and instead found discriminatory treatment and predetermined outcomes.³ It is vital therefore that even while we attempt to establish model procedures, the implementation of those procedures must be fair, ethical and faithful to congressional intent.

While assuring the fair treatment of those asylum applicants who reach our shores, we must also honestly look at ways which this Government may assist in dissuading persons from leaving their homelands. Here again a broad view with an international focus will point the way toward sensible solutions. Examples of international solutions may include: (1) Increased diplomatic efforts or targeted aid to those countries where political repression or economic deprivation is the root of their instability; (2) Direct international or U.N. involvement in the asylum process, including care and maintenance, determinations of refugee status, international resettlement of those who are refugees, and repatriation of those who are not; and (3) Accurate detection of political unrest to facilitate early identification of third countries amenable to refugee relocation. An "international" solution now under consideration, interdiction at sea, is no solution at all; rather, it contravenes all notions of fairness and undermines all attempts to respond rationally. Haitians desperate to flee will not be deterred by interdiction. Interdiction also may encourage other countries to turn away legitimate refugees.

³ Haitian Refugee Center v. Civiletti, slip op. at 162.

We must accept our leadership role in the international community. Our image will be enhanced only when we strive to deal honestly, realistically and fairly with the worldwide refugee problem. Negative approaches, narrow views, and makeshift measures will not only compound our domestic situation but set a poor example to other nations whose stability at this moment is threatened by growing refugee populations. Specific proposals for U.S. asylum policy are analyzed below with these broader considerations in mind.

Analysis of Proposed Policies

The current system of deciding asylum claims is neither efficient nor protective of the liberty interests and due process rights of the applicants. First, even the current procedures for reviewing asylum claims have been unfairly applied, as is documented in Haitian Refugee Center v. Civiletti.⁴ In that case, the court found that the intended goal of the INS was to deny asylum to all Haitians, and the method to accomplish this end resulted in the wholesale disregard of due process guarantees. As Judge King concluded,

...There was a program at work within INS to expel Haitians. Their asylum claims were prejudged, their rights to a hearing given second priority to the need for accelerated processing Virtually every one of the violations occurred exclusively to Haitians. The violations were discriminatory acts, part of a Program to expel Haitians..... Those denials were not case by case adjudication, but an intentional, class-wide summary denial... Over the past 17 years, Haitian claims for asylum and refugee have been systematically denied, when others have been granted.⁵

Second, the process for deciding asylum claims is not only unfair in its application but is overly complex. The present system

⁴ Id.

⁵ Id. at 138-39.

provides several avenues of approach for raising a claim for asylum and duplicity or delay may result. The applicant may also be perceived as raising an asylum claim as a delay tactic thereby possibly jeopardizing the chances for success of a valid claim. Another complexity in the present system is the requirement to seek an advisory opinion from the State Department's Bureau of Human Rights and Human Affairs in all cases. When INS is required to await a response from BHRHA, additional delays occur. Furthermore, when the recommendation is received and relied upon, the applicant's position may be severely harmed given the unfair and conclusory processing for which the State Department has been criticized. This additional step affects both the speed with which the process operates and the accuracy of the substantive decision.

In any procedure adopted, the following principles must be the guiding framework:

- (1) Asylum applicants must be fully apprised of their rights;
- (2) they must be provided with effective assistance of counsel;
- (3) they must have sufficient time to gather, prepare and present evidence and witnesses at all stages of the proceedings;
- (4) they must have the opportunity to review all evidence presented against them;
- (5) they must be afforded expeditious resolution of their claims;
- (6) and if their claims are denied, they must receive in writing an explanation stating the reasons for the denial; and
- (7) they must have an opportunity for appeal.

These basic principles help to assure that the procedures will protect the rights of individual applicants.

These principles are particularly important to the individuals who apply to the U.S. for asylum. Many of these people are unfamiliar with U.S. rules of law. Looking at the specific Haitian

setting, the applicants may have been unfamiliar with any system of laws. Judge King notes, "the law in Haiti on any given day is what the President says it is."⁶ Given this background, it can not be disputed that applicants must be fully apprised of their rights, in their own language, and so that they can understand their rights. This appraisal is also mandated when we consider the well documented, deliberate attempts by INS personnel to prevent asylum applicants from learning what rights they have.

In addition to being apprised of their rights, for similar reasons applicants must be provided with effective assistance of counsel. The asylum applicant requires effective counsel in order to compile evidence, locate witnesses, cross examine government witnesses, analyze the evidence, apply legal principles to the facts, and comply with the court's procedural rules. The matters which applicants are litigating are matters of life and death. Fairness dictates that such persons be provided with counsel and that counsel be given sufficient time to prepare the applicant's case. In addition to fairness, it must be noted that the applicant has the burden of proof and this further underscores the need for effective representation.

The hallmark of due process is that the applicant be able to review the evidence against him/her, and prepare and present rebuttal. The need for review of all evidence cannot be denied considering past State Department inaccurate, predetermined and dishonest decisions, and taking into account the seriousness of the matter, and the ever present possibility of good faith errors.

It is also in everyone's best interest to participate in an expeditious proceeding. The applicant benefits by knowing what his/her status is, the detainee will be released from confinement that much sooner, and the government avoids the added cost which delay always presents. Speedy resolutions, however, must not be pursued at the risk of denying due process.

⁶ *Id.* at 100.

Furthermore, the importance of providing the asylum applicant with an opportunity for judicial review can not be overemphasized. To deny the federal courts jurisdiction over asylum claims would in effect be an admission by the Executive Branch that it has no intention of carrying out the laws relating to asylum in a fair and lawful manner. The case of Haitian Refugee Center v. Civiletti exemplifies the importance of the role of the independent judiciary in interpreting and applying the law in accordance with the intent of Congress and the Constitution. As Judge King found after reviewing the Haitian Program:

Those Haitians who came to the United States seeking freedom and justice did not find it. Instead, they were confronted with an Immigration and Naturalization Service determined to deport them. The decision was made among high INS officials to expel Haitians despite whatever claims to asylum individual Haitians might have. A program was set up to establish this goal. The Program resulted in wholesale violations of due process, and only Haitians were effected.

This case further illustrates the importance and value of class actions as a method of assuring lawful and expeditious adjudication of asylum claims. Class actions serve an important function of minimizing the use of scarce court time and resources while safeguarding the interests and rights of those affected. If the government is violating the law, it is more efficient to have that determined by a class action rather than thousands of individual appeals.

Models

Asylum is not merely a domestic immigration matter. Rather it is a privileged status recognized in the U.N. Protocol and other

⁷ Id. at 162.

international instruments. Consequently, involvement of the international community will promote honest, fair and expeditious proceedings designed to resolve asylum claims.

For many years the U.S. has argued that refugees and asylees are the responsibility of the international community. Yet when refugees seek asylum in the U.S. we evaluate their claims solely within the context of U.S. immigration law and policy. Treating Haitians or Salvadoreans as illegal aliens, for example, improperly limits the possibility of international assistance and exacerbates our own inability to effectively respond to the influx of refugees. Furthermore, in other parts of the world, the U.S. helps to finance and run U.N. refugee camps. Yet when refugees arrive at our shores we establish our own detention centers without providing any opportunity for international participation. International models should be utilized in the U.S. as well as in other parts of the Caribbean basin. Involvement of the international community is essential to facilitate a more honest approach to the root causes of migration, and to involve other countries in the process of resettlement.

If, however, the U.S. chooses to retain sole jurisdiction over persons seeking asylum on our shores, the present system must be improved. Under the current system the district directors and immigration judges have jurisdiction over asylum claims. However, these administrative officer have no expertise in evaluating asylum claims. Rather than allowing these untrained INS officers to review such a crucial life or death matter as asylum, new asylum officers should be appointed. These asylum officers will have the expertise necessary to fairly and expeditiously evaluate asylum claims. Further, these asylum officers would be independent of both the INS and the State Department. Although the State Department may have an interest in evaluating claims for asylum, as noted previously, its past record would indicate that it is not to be trusted.

Assuming a new class of asylum officers is established, we must then consider how the process will function. The proceedings must

be adversarial in keeping with our basic notion of fairness. As outlined previously, notions of fairness are especially important in proceedings against individuals totally unfamiliar with our judicial system and subject to abuse by our own governmental agencies such as the Department of State and INS.

The asylum applicant must be advised of his/her rights and be given sufficient opportunity to consult with an attorney. It is imperative that applicants be initially guided by someone sympathetic to their cause in order to avoid being deceived into admissions which may be detrimental or fatal to their case. In addition to providing the applicant with the necessary information, the applicant and his/her representative must have ample opportunity to gather, prepare and analyze all evidence necessary to meet the burden imposed upon the applicant.

In place of the unreliable State Department opinions, advice should be sought from a new advisory board. This board should be established independent of any government agency, and consist of representatives of the State Department, and nongovernmental organizations such as UNHCR, and Amnesty International. This expert body may efficiently develop refugee and asylum standards, suggest better procedures, review selective applications for asylum on an individual or group basis, and consult with the Executive and Legislative Branches in times of emergency such as the recent Cuban-Haitian influx of refugees. This body may also be responsible for preparing "group profiles" to assist asylum officers in deciding asylum claims.

The advantages of such an independent board would outweigh any problems initially perceived in its establishment. This board would enjoy an independence which will foster greater confidence in it and promote the perception and reality of fairness. The advisory opinions it renders will benefit from an overall view and will more likely present a balanced and honest picture of the events and climate within a country. By investigating and making its findings known such a board will substantially cut down on the requirements of

the asylum officer and facilitate the presentation of evidence necessary for the establishment of the applicant's case. The board will be viewed as neutral, and its involvement may thereby generate fewer appeals from the decisions the asylum officers would make. Where the board has previously conducted investigations, the waiting time will be cut considerably. Again the overall theme of fairness will be served by such an independent and expert board.

The right to appeal on an individual or class action basis from an adverse opinion by the asylum officers must also be available to the applicant. If the initial determinations are made fairly, few appeals may actually occur. However, appeal to an independent judiciary remains an essential element for fair adjudication of asylum claims.

The present Administration's policy of detaining asylees in camps also raises several questions. The main concern is the impact on both the asylum applicant and the host community. The detainee suffers physical and psychological deprivation in centers where the facilities are less than adequate and the detainee has no idea when or if he/she will be released. Furthermore, a policy of detention provides incentive to asylum applicants to avoid arrest and remain underground. The interests of the host community are twofold: concern for the health and welfare of its citizens and for the detainees. Detention centers have cost the federal as well as state and local governments millions of dollars. Surely it would be more cost efficient to parole detainees or release them to sponsors. Further, fostering the development of an underground community is hardly desirable from the local community's point of view. It may be more cost efficient to parole or allow refugees to be sponsored than to detain them.

Another questionable result of detaining refugees is the example it sets for other nations faced with similar refugee influxes. Furthermore, the legality and practical effect of the detention camp approach may be different if we would provide other international organizations, such as the U.N., with the

responsibility for their administration and maintenance. Only in that way may we reduce our own expenditures while facilitating international cooperation.

Conclusion

Our overall view must now be from the international perspective. The costs in dollars, time, and human lives makes it imperative that we seek comprehensive solutions. The international setting offers policy models, and avenues for cooperation. As in the past, treating an essentially refugee phenomenon as an "illegal immigration" problem will lead only to impractical and tragic policies.

Senator SIMPSON. Thank you very much. Mr. Kurzban, please.

STATEMENT OF IRA KURZBAN, COUNSEL FOR NATIONAL CIVIL LIBERTIES COMMITTEE AND THE HAITIAN REFUGEE CENTER, INC.

Mr. KURZBAN. Thank you, Mr. Chairman. Thank you for the opportunity to speak before the subcommittee today.

I think there is little question that the problem regarding asylum, and particularly first asylum, is one that is not susceptible to easy, facile solution. I think if we have learned any lesson in the last several years it is that one.

The proposals and suggestions that are presently before this subcommittee, however, are ones which I think do not effectively address the problems. Our inability to address effectively these problems stems from our failure to analyze what are the underlying causes of the problems we presently have in regard to first asylum.

I think there are essentially three causal factors contributing to these problems.

STRUCTURAL DEFECTS IN THE ASYLUM PROCESS

First, problems arise from the structural defects within the State Department and the Immigration and Naturalization Service. The House subcommittee in 1976, in a report on Haitian emigration, noted what the essential problem was in regard to the State Department's involvement in the asylum process. That problem is simply that we do not have resources in any of the individual consulate offices around the world to investigate effectively the allegations made in an asylum application.

What now happens is that those decisions are either left to a desk officer in the State Department or they are determined by our own foreign policy in regard to that country.

Second, there are structural defects within the Immigration Service system itself in regard to processing asylum applications. We presently have a bifurcated system whereby the district director decides something that essentially is decided a second time before the immigration judge.

That system, if it were designed to correct any errors in the first decision, by granting the immigration judge's additional rights to correct any errors that might be generated from the initial process by the district director, would be sensible.

However, the way the process now works is that the district director essentially relies on the decision of the State Department. That decision is not based on any fact; it is based on what an asylum officer sitting in Washington thinks, because we do not have the recourses to investigate any of those claims. When that happens, the district director simply issues an opinion in accordance with the asylum officer's decision.

That, in turn, is then used as the basis for the immigration judge's decision. In effect, we have a tripart system that does not insure against any error correction.

The thrust of my testimony in writing has been that we need to eliminate these duplicative processes, but at the same time to insure that there is some type of error-correction mechanism be-

cause we are dealing with a matter that may be, if we are wrong in a decision, as serious as condemning someone to capital punishment.

The second problem—and I think this was illustrated in some of the language used by the officers from the Immigration Service who testified just prior to us—is that there are competing goals within the Immigration Service itself.

On the one hand the orientation within the Immigration Service is that they are, in some sense, rewarded for rapidly/expeditiously processing applications. I know, Mr. Chairman, that you raised the backlog problem with both the State Department and the Immigration Service. Their orientation is in terms of processing those applications as quickly as possible. They are in effect, as a bureaucracy and an organization, rewarded by how fast they can process those cases.

In contrast to that, there are certain legal norms that the Service is required to follow. It is no mistake that for the last 5 years we have won every single case that we have litigated against the Immigration Service because their rational behavior is presently dependent upon their inability to follow their own regulations.

The third thing that I think is a major obstacle toward arriving at a fair solution to the asylum process is related to our foreign policy, and I think Mr. Swartz addressed that.

What I would suggest is simply this, that we cut out the duplicative processes that presently exist. There is no reason to presently have a process before the district director and a process before the asylum or immigration judge when in fact they are both doing the same thing.

In place of that, I think, what we should look to is the traditional remedy that the courts have looked to in administrative proceedings, which is to change the standard and burden of proof. That is the essential issue.

Right now, the way that the law is constituted, it is virtually impossible to prove an asylum claim. The burden is so overwhelming on the asylum applicant that there is no chance of proving it and the result is that the decisions are based on foreign policy considerations rather than each individual application.

[The prepared statement of Mr. Kurzban follows:]

THE PREPARED STATEMENT OF IRA J. KURZBAN

There is little doubt that immigration policy, practice and law holds problems of extraordinary complexity with relatively few facile solutions. These problems, and our seeming inability to find solutions to them are heightened when seeking to resolve matters of refugee policy and, more specifically, matters of first asylum. Our inability to establish a coherent policy on matters pertaining to persons entering the United States as their first country of asylum, however, does not arise merely from the vicissitudes of public opinion. Rather, it primarily arises from the traditional structural defects within the Immigration and Naturalization Service and the Department of State, the conflict between bureaucratic goals and legal norms, and the maintenance of a foreign policy contrary to the elimination of factors causing asylum flight.

The structural defects within the Immigration and Naturalization Service which give rise to the inability to resolve problems concerning first asylum are matters of long standing related to the bifurcated immigration process.

Stet., Report of the Select Commission on Immigration and Refugee Policy: Immigration and Nationality VI, 13 San Diego Law Review, 1-141 (Dec. 1980).

The bifurcated system between the district director and the immigration judges as it pertains to asylum has gone through numerous revisions since 1972. The regulations under the original 8 C.F.R. §108 permitted an application for asylum to be filed only before the District Director. Regulations which were finally published in 1979 provided for the adjudication of asylum applications before the district director and the immigration judge. More recently, the regulations promulgated on June 2, 1980 pursuant to the Refugee Act of 1980 modified the previous regulations by developing a complex jurisdictional scheme concerning the

timing and determination of asylum applications. In developing these administrative schemes, the INS failed to distinguish between a system which is duplicative and one which is redundant. While both systems may repeat the same function, a redundant system, unlike a duplicative one, is designed to eliminate error. See, Landau, Political Science and Political Theory (1972).

The present separation between the district director and immigration judge in the determination of asylum applications adds little to the reduction of erroneous determinations of asylum applications, while it increases costs for the INS. In short, it is duplicative rather than redundant. This problem arises due to the INS' inability to see itself as determining an asylum application independent of State Department direction. The defect, in the present bifurcated system, then, is not that both the district director and the immigration judge may determine asylum claims but rather that both entities do not see themselves as performing a function independent of the Department of State. In this manner, the District Director makes his determination, in almost all cases, based upon the Department of State's recommendation and the judge, in almost all cases, follows the District Director's recommendation. Thus, we have a system that is merely duplicative without advancing the important function of eliminating error.

The structural defects in the State Department merely add to this process. Congress has now, long recognized, the inability of the State Department, even with a very limited number of applications, to make a meaningful inquiry into an asylum claim. Haitian Emigration, (H.P. Report 94 Cong. 2nd Sect. Subcommittee on Immigration Citizenship and International Law (1976). The present system, theoretically, relies heavily upon American Embassies throughout the world to verify facts alleged by individual asylum applicants. Unfortunately, American

consular officers, often limited in number, do not have the time or resources to effectively investigate asylum claims. Thus, the determination of an asylum application is left to the vicissitudes of either the Desk Officer in the State Department or the States Department's general policy toward a particular country. This structural defect results in procedures which are unequivocally contrary to our stated policy of determining each individual refugee application on its own merits. The determinations which are made in asylum cases, therefore, reflect our foreign policy rather than our immigration and international policy of accepting bona fide refugees. In no case, is this clearer than the present treatment of Salvadorians and Haitian asylum applicants.

The second major difficulty which prevents any facile solution to the appropriate procedure for first asylum applicants arises from the conflict between bureaucratic goals and legal norms. Unlike other areas of immigration law such as the granting of adjustment of status, the determination of preference petitions, or the approval of certain nonimmigrant visas, the INS sees the problem of asylum applicants as an enormous and unwanted addition to their already over-burden paper flow. As the primary function of the INS as a bureaucracy is to increase activity in deciding and "statisticizing" cases, the rational, short term, approach is to utilize a policy which will eliminate applications as quickly as possible. Indeed, this is precisely what the INS did in Haitian Refugee Center v. Civiletti, 503 F.Supp. 442, (S.D. Fla. 1980) (King, J). In this manner, the INS' drive to eliminate cases subordinates legal norms to bureaucratic goals. The INS' lawless appearance, therefore, is not the result of any error in decisionmaking but arises precisely because of their rational bureaucratic action. It is neither a mistake,

nor the trick of skillful lawyers, therefore, that has resulted in case after case condemning the INS' behavior for their failure to follow legal norms. See, Sannon v. United States, 460 F.Supp. 458 (S.D.Fla. 1978); Haitian Refugee Center v. Civiletti, 503 F.Supp. 442 (S.D. Fla. 1980); National Council of Churches v. Shenefield, Case No. 79-2959-CIV-ALH (S.D. Fla. 1980); Lucien Louis v. Doris Meissner, Case No. 81-1260-CIV-ALH (S.D.Fla. 1981); and Fernandez-Poque v. Smith, Case No. 81-10848 (N.D. Ga. 1981). Of course, this ultimate, but predictable, legal response by the asylum applicants who are abused in the process makes the entire procedure ultimately irrationale, even from the bureaucratic point of view, as the INS is required to take expensive corrective action under court order. Thus, rather than moving forward to a clear concise resolution of the determination of asylum applications, the entire process becomes a chess game of illegal moves counted by "courtly" action.

The third area of concern in analyzing the origin of problems related to the determination of asylum applicants has generally been hidden from public view and the arena of public debate. This aspect goes to the heart of our foreign policy and, principally, our continuing support of regimes which produce asylees faster than General Motors or Ford produces cars. It is only in the past ten years that we have begun to suffer the misfortunes, and to assist the unfortunates who are the product of our foreign policy, which for the past half century has supported anti-democratic forces in the Caribbean and Central and South America. In effect, the asylum applicants we are now seeing in our country are the ghosts of our unrealistic foreign policy which has now come back to haunt us. The inevitable result of this problem has been to politicize the entire asylum process. Thus, Salvadorian and Haitian applicants are called "economic refugees" - a term which literally has no meaning - while we continue to provide asylum to persons fleeing communist

regimes despite the clear and intentional nonpartisan language of the Refugee Act of 1980. We have not only participated in the politicization of the refugee process but have been the subject of it. The Mariel boatlift was nothing more than the consequence, horrifying as it might be to some, of the politicization of the entire refugee process.

II. REFUGEE MYTHS

Any analysis of the asylum process, however, should not ignore the "myths" that effect decisionmaking in this area. These myths, because of our ability to translate preception into action, are a significant catalyst to understand why certain procedures are being proposed. It is therefore necessary to analyse these myths to determine what information, if any, they provide toward a fuller understanding of the asylum process.

A. THE USE OF THE ASYLUM PROCESS AS A SUBTERFUGE

The INS has long claimed that the asylum process is being used as a subterfuge to delay the departure of persons otherwise ineligible to enter the United States. Although this may be true in certain individual cases, what does this type of claim tell us about the asylum process? Does this type of claim say anything more than that any system is subject to abuse? The speculation made several years ago that Mexicans would begin to claim political asylum by the thousands because the Haitians were, has never occurred. Moreover, to the degree that this suggestion makes a claim that the procedure is subject to abuse, clearly, any procedure, short of completely eliminating asylum would be subject to abuse. What this claim really appears to say is that the present process may be open to more abuse because of the length of time it takes to adjudicate an asylum application. But the present problem is not the length of time it takes

to adjudicate fully an asylum application, but rather the length of time it takes to begin the process of adjudication. Despite the claim that the present system is subject to abuse because of the appeal process, the problems and litigation which have arisen in asylum cases have nothing to do with that process. Indeed, in most of the cases where the INS has been challenged in the asylum process, their own defense has been that all of these problems could be cured on appeal. The locus of the problem and the delay is not the appeal process at all but rather the initial "entry" level application process. It is this process that is presently backlogged. Thus, any determination to shorten the time of appeal or to change the appeal process will have almost no effect on the present problem in regard to asylum applicants.

B. UNLAWFUL ENTRY IS AN INDICATION OF AN
INVALID ASYLUM APPLICATION

The public preception, not the preception of members of Congress or the officers within the INS, the Department of Justice or the Department of State, is that the arrival of persons in an illegal status to the United States is an indication that they are not bona fide asylum applicants. The Haitian who is smuggled by boat, the El Salvadorian who clandestinely enters at the Mexican-U.S. boarder or the European who entered the United States with a fraudulent visa are all, under this theory, not valid asylum applicants. This preception, although understandable, is without historical or legal support. During the Second World War tens of thousands of Jewish refugees suffering persecution under the Nazi regime fled to England and the United States with false passports. The provision and issuance of these false documents, was in fact, a major multimillion dollar business in Germany and the Eastern European countries. See, Arendt, Eichmann in Jerusalem, (1963). Indeed, less than

two weeks ago, our country made the Scandinavian diplomat Wallenburg an honorary citizen of the United States - one of his greatest deeds being the issuance of false passports to Jews in Hungary to permit them to escape the terror of the Nazi regime. Moreover, the United Nations High Commission on Refugees specifically recognizes the fact that persons fleeing their country of origin are not likely to possess valid exit documents from that country or entry documents to the country they are fleeing to. The Office of the United Nations High Commission for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status, in fact, specifically has noted that persons carrying valid passports may not be considered refugees because certain countries may believe that a valid passport is an indication that the "issuing authorities do not intend to persecute the holder for otherwise they would not have issued a passport to him." Handbook, 147.

C. THE CLAIM THAT WE HAVE LOST CONTROLS
OUR BORDERS IS NOT VALID

The claim that we have lost control of our borders in regard to persons who seek asylum in the United States is simply contrary to fact. The underlying assumption of this claim is that persons seeking asylum are doing it to "come to the United States" rather than merely seeking to flee their own country. In bureaucratic terms, this has been described as the "pull" as opposed to the "push" factor, this terminology contributes to the image that this country is literally being invaded by people from the Caribbean and Central America. This approach, of course, ignores completely the pattern of migration and flight of asylees, only some of whom find their way to the United States. For example, the people of Haiti are literally a people in exile. Between ten and fifteen percent of the entire population of Haiti is in exile. These people, however, do not only come to the United States. There are Haitians in the Dominican Republic.

in the Bahamas, in Cuba, in Canada, in Venezuela, in Mexico and in France. There were, for example, more Haitian doctors and Haitian psychiatrists in Montreal by 1971 than there were Haitian doctors and psychiatrists in all of Haiti. There were more Haitian economists working for international organizations by 1971 than there were Haitian economists in Haiti. Haitian, Written in Blood (1978).

The same pattern is now emerging with reference to El Salvadorians. There are substantial numbers of El Salvadorians throughout Central America including Honduras, Costa Rica, Nicaragua and Mexico.

However, even if the flight of these people was directed solely to the United States, which it is not, the numbers of persons are relatively small in comparison to the overall immigration of people to this country. For example, although the Haitians' arrival by boat to the United States is, in itself, a spectacular media event, the numbers of Haitians constitute a trickle, not a flood. Although the number of people seeking asylum in the United States has increased significantly in the past two years, those numbers could be attributable as easily to the existence of organized smuggling operations as to the so called "pull" factor. If this is true, then we should direct our efforts toward ending illegal smuggling rather than diminishing the rights of persons once they get here.

III. THE CENTRAL ISSUE

Public discussions concerning immigration have masked the real problems concerning the asylum process. This committee and the Congress have not been called upon to determine how or if we should prevent asylees from coming into the United States. If that was the question, then the issue would simply be one of enforcement and would be addressed to appropriations rather than structure. The fundamental problem,

here, however, is to eliminate structural weakness and conflicting goals in the bureaucratic treatment of asylum applicants. In effect, Congress has been called upon to resolve the conflict between the INS organizational goals of deliberating, adjudicating, and deporting applicants as rapidly as possible with the competing legal norm of protecting the integrity of fair procedures to insure that those with valid claims are not ignored.

IV. THE DEVELOPMENT OF AN ASYLUM SYSTEM
MUST BE GROUNDED UPON THE ACCEPTANCE
OF A FAIR PROCEDURE

Although the content of the procedure may vary, any fair procedure must be one which is intelligible, impartial, participatory, and expeditious. Without all these characteristics, there would be little need to have a process at all. Although one could argue for a process devoid of real fairness but giving the appearance of fairness, this position is inconsistent both with our belief that bona fide refugees should have a haven from persecution, and with our respect for the integrity of our legal system. If Congress were to construct a system which was not inherently fair but rather a mere "gesture to a ritualistic requirement," then our courts would not long tolerate its presence. The appearance of show trials without substance undermines the credibility of our legal system both here and before the court of international public opinion.

In developing a fair system, the intelligibility of that system to the applicant is paramount. An applicant for asylum must know that a procedure exists, must understand how he can apply, and must be given an opportunity to apply in a manner that is intelligible to him. See Handbook on Procedures and Criteria for Determining Refugee Status.

The Office of the United Nations High Commissioner ¶189-205. The procedure must obviously also be impartial. Any unfavorable predetermination of a particular group of applicants would be repugnant to our international commitment

under the United Nations Convention and Protocol, the Refugee Act of 1980 and the core values of our Constitution. To the degree that this factor is disregarded due to prejudgment on the part of the State Department because of certain policy objectives, credibility of the process diminishes and becomes subject to legal challenge.

The process also must be constructed in a manner to provide for the full participation of the asylum applicant. The applicant personally or through counsel should have the opportunity to present all evidence in his favor, to rebut all evidence which may be brought against him and most importantly to be given sufficient time to gather the evidence to present his claim. In so doing, the procedure must account for both the difficulty in obtaining information, Zamora v. INS, 534 F.2d 1055 (2nd Cir. 1976), and that an applicant finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities . . . often in a language not his own." Handbook, ¶190.

Finally, any process must be expeditious to be fair. An applicant with a valid claim for asylum should not be left without an opportunity for expeditiously determining his claim.

The fundamental bureaucratic and legal rationale for a fair system which includes these principles is the elimination of potential error. Other than in capital punishment cases, there is no area of law which has as severe consequences as the erroneous determination of the invalidity of an asylum claim. The cost of error is extraordinarily high and could result in persecution, physical harm, and potentially in death. As the Supreme Court recognized more than twenty years ago "there is always in litigation a margin of error, representing error in fact finding . . ." Speiser v. Randall, 357 U.S. 513, 525-526 (1958), and such error could have significant consequences here.

Just as "it is far worse to convict an innocent man than to let a guilty man go free," In Re Winship, 397 U.S. 358 (1970) (J. Harlan concurring), the same may be said of the asylum applicant. The traditional legal response to this type of problem has been to adjust the burden and standard of proof to the risk of comparative frequency of error. Thus, as Justice Harlan stated in In Re Winship, 397 U.S. 358 (1970):

"[As] the standard of proof affects the comparative frequency of...erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative disutility of each."

In the case of asylum, therefore, where the applicant generally presents his claim with diminished skills and resources, the standard and burden of proof should be modified to reflect the potentially harsh consequence of error..

V THE PRESENT AND PROPOSED TREATMENT OF ASYLUM APPLICANTS

Both the present and proposed administrative processes are deficient in their treatment of asylum applicants. The present administrative process is duplicative (though not redundant), cumbersome, time consuming and does little to protect the rights of bona fide applicants for asylum or to prevent the erroneous denial of valid asylum claims. As stated above, for example, the decision of the immigration judge adds little to the district director's decision which, itself, is almost always predetermined by the State Department. Thus, although an asylum applicant may exhaust numerous administrative processes they are generally of no avail to him. Rather than preventing the risk of an erroneous denial, the present procedures encourage it. The proposed "asylum officer" process, while eliminating certain duplicative aspects of the present process, provides no structural or substantive procedure to eliminate or to reduce error. In fact, the proposed system is lopsided. It forsakes any type

of meaningful process. for the administrative goal of the expeditious rendering of a determination. The asylum applicant is given virtually no meaningful participation in the process. The ten day deadline to submit applications at the risk of otherwise forfeiting the right to seek asylum completely ignores the difficulties inherent in obtaining information to substantiate a claim. Moreover, attorneys are relegated to the position of "watchful listeners" for their clients with little ability to provide effective assistance of counsel. Similarly, the proposed legislation wholly fails to make the asylum process intelligible to the applicant. There is nothing in the proposed statute that indicates that applicants without attorneys will be informed of the asylum process, the right to seek asylum or the information which they must submit. Additionally, there is no effort, in the proposed statute, to balance the sweeping structural changes with changes in the standard and burden of proof to insure the elimination or reduction in the rate of erroneous denials of valid claims. The present substantive standard adopted by the Board of Immigration Appeals, requires the applicant to "demonstrate a clear probability that he will be persecuted." Matter of McMullen, I.D. # 2831 (B.I.A. Oct. 1980). Given the structure that is proposed, the maintenance of the same standard and burden of proof eliminates all goals except the expeditious expulsion of asylum applicants, including those with valid claims. Finally, the proposed statute eliminates the one last resort that asylum applicants can now rely upon as a corrective to illegal administrative conduct. By eliminating the ability to seek judicial review on a class wide basis, the statute reduces the rights of applicants but increases the case load of the federal courts (who must hear the claims of procedural irregularities on a case-by-case basis) without providing any expeditious treatment of asylum claims. The result of this proposal will be even greater

delays if the reviewing federal courts on a case-by-case basis determine that the INS committed procedural error.

Ultimately, the proposal before this committee does not and will not affect the large number of present applicants seeking asylum. The present problem is lodged at the entry level of the administrative process and not the appellate level. The elimination of an effective appeals process simply raises the risk that persons returned to their country of origin will be persecuted, physically harmed or killed. This problem is heightened when there are no corresponding changes in the burden and standard of proof.

The proposed system's failure to provide any changes which will reduce the risk of error will simply result in additional delays when erroneous decisions are presented to the federal courts for review.

VI AN ALTERNATE PROPOSAL

Although the present system for adjudicating asylum applications provides the disadvantages of a cumbersome, nonexpeditious process that does little to protect the asylum applicant from erroneous decisions, the present proposal before Congress is a lopsided assault on the idea of providing a fair asylum process. We suggest the following changes be considered:

1. The provision of a substantial increase in resources to the Department of State so that they may effectively investigate the validity of asylum applications. Alternatively, if an increase in resources is unavailable, we suggest the elimination of the State Department from the asylum process. To the degree that the State Department wishes to intervene in any particular case they can easily do so, just as they have done in various court actions.

2. The elimination of the present duplicative, bifurcated system where the district director and immigration judge review an asylum application. The present system should be

replaced by an asylum court or an immigration judge sitting by special designation to hear asylum claims. The asylum court/special judge eliminates the impediment to a fair hearing which may arise as a result of the district director or the deportation judge's desire to expedite and complete a particular alien's departure. An immigration judge sitting separately or ^c specially to hear asylum claims has an interest both professionally and legally, to render a decision based upon full deliberation.

3. An applicant unsatisfied with a decision in his or her case, should be permitted to seek review in a United States District Court. This procedure eliminates entirely, the Board of Immigration Appeals from the determination of asylum claims. As the Board of Immigration Appeals, at least in asylum matters, is more often duplicative rather than "error correcting" a separate federal de novo review would substantially eliminate duplication while reducing the risk of error. The historic independence of the federal courts would also insure a complete evaluation of the asylum claim.

4. In response to the substantial elimination of certain processes, the standard of proof should be changed from "clear probability" to "the preponderance of the evidence" test. This would insure that an applicant, already burdened with problems of language, inaccessability to information to prove his asylum claim, and unfamiliarity with our legal system would at least "be given the benefit of the doubt." Handbook on Criteria for Determining Refugee Status, ¶196. Additionally, the burden of proof, although remaining with the asylum applicant, should shift if the applicant is successful in establishing a prima facie case for asylum.

5. The applicant should be given sufficient time to present his application with supporting evidence to the asylum court or immigration judge. The present suggested time period of ten days is totally unrealistic and will effectively

deprive an applicant of the ability to present a viable application. By providing insufficient time to present a claim the proposed legislation merely rationalizes the INS' belief that the applicant does not have a bona fide claim, thereby significantly increasing the risk of error. At a minimum an applicant should have thirty days from the time of his deportation or exclusion hearing to file an application for asylum.

6. An alien arriving in this country from a country where substantial numbers of persons have previously sought asylum should be notified of the right to seek asylum and of the procedures involved in the application for asylum. The applicant should be advised of the purpose and nature of the process and if unrepresented should be assisted in filing and application.

7. The right to change INS actions toward asylum applicants on a class wide basis should not be abridged. Access to courts are one of the only means we have in our society for redressing government misconduct. Moreover, the proposed case-by-case review would result in larger delays than at present, if the INS engages in erroneous or illegal conduct.

8. The applicant applying for asylum before the asylum court or specially designated immigration judge should retain all rights to counsel, to present witnesses, and to cross-examine witnesses as generally embodied in the Immigration and Nationality Act, regulations and the United States Constitution.

9. Substantial appropriations should be allocated to the asylum court or to hire immigration judges to alleviate the present backlog at various INS districts. This would substantially address the entry level problem which accounts for the present delay in the asylum process.

CONCLUSION

The present legislative proposal offers solutions to the wrong problems at the significant risk of making erroneous decisions which are possibly fatal to the applicant. In no other area of the law, should we be as concerned with the consequences of an erroneous decision, with the possible exception of capital punishment, then in this area. An erroneous decision could result in persecution, torture and possibly death. It is for this reason that our heightened attention should be paid to the asylum process. The proposal presently before this committee substitutes, in a lonsided manner, the goal of expeditiously completing a case for the fair determination of that case. In so doing, the present proposal mischaracterizes the problem as one of appellate review. The backlog of cases that presently exists, however, is not due to the availability of the appellate process, but rather to the inability or unwillingness of the INS to proceed at the entry level in an appropriate manner. The elimination of certain procedures utilized in the asylum process which are merely duplicative and do not assist the applicant is long overdue. However, the elimination of these procedures should be accompanied by changes in the standard and burden of proof to insure that the risk of an erroneous decision is reduced and to insure that there is a fair and full opportunity to present an asylum claim.

Senator SIMPSON. Thank you very much. Mr. Schwartz, please.

STATEMENT OF DALE M. SCHWARTZ, ESQ., PARTNER, LAW FIRM OF TROUTMAN, SANDERS, LOCKERMAN & ASHMORE, ATLANTA, GA.

Mr. SCHWARTZ. Mr. Chairman, I also thank you for the opportunity to be present today.

I was sitting here recalling as a younger person in another era, as a college student, working in this Senate on a program under the auspices of my own Senator from the State of Georgia. I had often longed for the opportunity to come before a committee some day—now I am not so sure that was a worthwhile dream, it is more a trial by ordeal having spent a good many hours preparing this testimony for you.

But we do so in the public interest and in the interest of doing what we think is fair and best. I know that this committee is groping for solutions to very hard problems at this time. This is an area, that of asylum, that has been given a great deal of focus and attention—perhaps even all out of proportion—by the media and by other people in recent months in view of the Haitian and Cuban situation.

I have had the privilege of having represented a number of the Cuban detainees in a class action emanating from the Atlanta Federal Penitentiary, and I had on hand experience with having represented hundreds and hundreds of people with asylum claims over the past years.

When the very concept of interdiction came out, Senator, I was concerned about it. The first thing that I did was look up the word in the dictionary, and I was rather shocked to find that in an earlier era interdiction was something that a church might do one step short of excommunication—cut people off from making certain sacraments if they committed certain kinds of sins.

In modern times, the dictionary tell us, that it means a steady bombardment of an enemy position. That was the first definition I found in the dictionary.

It gives me the sense that we have perhaps declared war on some not quite identified enemy, perhaps an enemy whose only sin is that they seek some refuge or asylum in the United States, fleeing persecution.

I also grappled with the question of the right under international law for the United States—and in fact under our own laws—to intercede or interdict ships at sea and board those vessels with the purpose of searching them to determine if persons were headed for the United States without proper visas.

I learned after some exhaustive study of admiralty law—more than I had ever wanted to learn, I might add—that we do maintain that we have the right to stop vessels at sea if they bear U.S. flags. That sounds reasonable to me. However, unless we have some sort of bilateral and multinational agreement with other countries, I think that the whole process of interdiction can become dangerous.

We have heard today that we have such an agreement with the Government of Haiti at this moment, and we are stopping ships presumptively outside of Haitian 12-mile territorial limits.

But what if Haitians choose to use some other flag-carrying vessel? If a group of Haitians, for example, were to board a Russian vessel and head toward the United States, would we interdict that ship? What if it would not stop, do we surround the ship? Do we fire shots over its bow? Do we make some attempt to sink it? I mean, where does the process of interdiction end?

I am afraid it can lead to dangerous international confrontation. It can also lead, perhaps, to the death of a number of innocent people as it did in the experience we had in Southeast Asia with people fleeing that continent, headed for Malaysia and other nations who refused to allow them to enter. The boat sank at sea because they had no port to go to.

So, once we board those vessels we have discussed what the process of examining people would be. The Immigration Service would now have us not have any sort of an appellate procedure to determine whether their claims were just or not. There are too many instances that this committee is familiar with that have been widely reported in the media over the years of horrible mistakes having been made in the area of granting or not granting asylum.

The case of the Lithuanian seaman that everybody is so familiar with is one that comes to mind most quickly.

Only yesterday afternoon I had an attorney call me, a colleague of ours in another part of the United States, who had just received a notice this morning, he was rather irate.

He represents the son—he tells me—of the former chief of the secret police of the Government of Iran, the Shah's government. That young man had received a notice from the State Department that morning that in spite of the fact that his father I believe, and uncle, as I recall, had been assassinated in the earliest days of the revolution, that the State Department had determined that he could not show that persecution would be directed individually toward him if he were to return to his country.

Those types of decisions make us question whether the process is in fact a fair one. From testimony that was elicited in the Haitian cases that I have read, officers who are making these asylum decision claims—particularly within the State Department—are often told how the decision should come out.

From a memorandum that is attached to my testimony which I would offer to the committee to be made part of the record today, Senator—

Senator SIMPSON. Without objection.

Mr. SCHWARTZ. Thank you.

There is a memorandum of a former immigration judge who recently resigned and talked in terms of how much pressure was put on the immigration judges by Washington, by the central office of the Immigration Service, to come down hard in denying the Cuban asylum cases that he and other judges were hearing around the country.

They really have no discretion and in fact, unless there is an independent type of judiciary who can hear these kinds of cases, we wonder if there is any process that is fair or in the nature of due process.

Now, my proposal that I have set forth extensively in my written testimony, Senator, is that we create some sort of a system by

which either Federal judiciary officers or magistrates of the Federal court could be first instance or perhaps appellate officers to hear these types of asylum claims. They would not do it in a casual moment at a ship at sea, they would do it in more of an adversarial proceeding.

Quite often—if I may add this—quite often persons who are really, truly fleeing persecution do not have the luxury of time to bring with them lots of documents, birth certificates, newspaper stories, magazine articles, from their home country. Certainly, they are not going to have that on board the little raft that they just jumped on yesterday, or the ship that they boarded.

Unless they are given a fair opportunity to present their case I am afraid that we are going to make many, many horrible mistakes in the process that will cost us an awful lot of good will among men of good intentions throughout the world.

[The prepared statement of Mr. Schwartz follows:]

PREPARED STATEMENT OF DALE M. SCHWARTZ

CHAIRMAN SIMPSON; Members of THE SUBCOMMITTEE:

My name is Dale M. Schwartz. I reside in Atlanta, Georgia, and am a partner in the firm of attorneys known as Troutman, Sanders, Lockerman & Ashmore, a large law firm which practices in nearly every field of law, including corporate, administrative, tax, international, public utility regulation, and immigration law.

While my own area of concentration is in the field of international corporate and business law, I have devoted a substantial percentage of my career to the practice of United States immigration law--primarily for international business clients of our firm. My interest in immigration law (and particularly in refugee matters) dates back to my college days when, for a short period of time, I had the wonderful opportunity to work in the United States Senate under the auspices of Senator Richard B. Russell while I attended George Washington University. I have actively practiced immigration law for nearly 14 years, and am a member of the Board of Governors of the American Immigration Lawyers Association, and a member of the American Bar Association, and the Bar Associations of the State of Georgia and City of Atlanta. I am admitted to practice before the United States Supreme Court, the United States Tax Court, the Board of Immigration Appeals, and a number of federal and state courts.

In addition to my professional practice, I serve on the national Board of Directors of HIAS, a major refugee resettlement agency, and am on a number of other boards and committees of other national nonprofit organizations directly involved or concerned with the plight of refugees and those seeking asylum. Some of these organizations

regularly assist the government of the United States in the resettlement of refugees in our country.

I wish to emphasize that, while I feel certain that a number of members in and professional staffs of the organizations in which I serve would share my views, I am testifying today in my individual capacity, and my remarks are solely my own and do not in any way officially represent the views or policies of any of the foregoing organizations.

In the past several years I have been involved in two major national immigration matters relating to refugees and asylees. The first concerned the handling of the claims of those citizens and nationals of Iran who the immediately proceeding Administration sought to deport during the hostage crisis and who feared persecution if returned to that unstable country. I assisted in discussions with the White House, the Department of State, and the Immigration and Naturalization Service, and safeguards were established to ensure that those who had reasonable fear of persecution would not be deported, and that families could be reunited in the United States on a humanitarian basis. The second involvement occurred when I was asked to serve as counsel for the recent Cuban boatlift members who had been incarcerated in the Atlanta Federal Penitentiary and other federal facilities for more than a year after their initial arrival in our country.

It is with the above background that I come before you today to share my views on what I consider is a topic of great national concern high on the Administration's and the Congress' agenda of important issues: that of procedures relating to those persons who have entered the United States, who seek to so enter, or who are on the way

to this country, and who state they wish to be granted refugee or asylum status because they fear persecution if returned to their home countries. The attention given by the news media to this subject (while perhaps all out of proportion when viewed in light of other national issues, due in part to the humanitarian nature of the issue) serves the underscore the importance of having a national policy that is fairly applied, easy to understand, and promotes our national interests in a manner which reflects our fine tradition of providing a refuge and safe haven for the truly oppressed. The refugee legislation enacted in the last term of Congress goes a long way toward meeting these goals, but the recent embarrassments the United States has suffered with regard to Cuban and Haitian entrants point out that additional legislation may be necessary--particularly in the area of asylum procedure.

Originally the United States had an "open door" immigration policy, and we were not concerned with the issues being discussed today. After the time we enacted our first exclusion statutes, nearly all of our legal immigrant population entered our country on commercial ships in an orderly manner and were inspected and admitted to our country. With the advent of the airplane traveling in intercontinental flight, a new method of the entry of immigrants to our land became the norm. As the result of our statutes providing for fines and penalties on carriers for boarding persons destined for our country without proper visas, the air carriers played and continue to play an important role in our immigration process by prescreening passenger-applicants for proper visas. However, we never really contemplated that huge numbers of persons from nearby nations would board oceangoing vessels and

small rafts and boats to come to our shores to request political asylum. It is with this phenomena which we must now deal, for our recent experience in dealing with the Cubans and Hatians has been extremely disconcerting, even when viewed in its best light.

The Administration's proposal, as yet somewhat undefined in its particulars, is centered around the concept of "interdiction" of vessels at sea. From what we can glean from the recent Executive Orders of the President, media reports of statements of the Attorney General and the Acting Commissioner of the Immigration and Naturalization Service, it is proposed that the United States Coast Guard will interdict "suspicious" boats far outside the territorial waters of the United States to determine if such vessels contain passengers headed to the United States without proper visas.

It is my view that this policy, if unilaterally applied by the United States (that is to say, without bilateral or multinational consent), is totally unworkable; will lead to dangerous confrontation between nations and perhaps the death of innocent victims; violates basic principles of international law and the spirit, if not the letter, of various United Nations treaties, reports, and conventions dealing with the subject of refugees and asylees; and is morally and legally wrong to implement as a matter of national policy.

The very word "interdiction" has harsh historical meaning. In civil law it refers to "any prohibitory act or decree of a court or administrative officer" -- a harmless enough term. But historically interdiction came to mean the cutting off authoritatively from certain ecclesiastical functions and privileges; a punishment by which

the faithful were forbidden certain sacraments and were prohibited from participation in sacred acts and observances. In modern times the dictionary tells us that interdiction means "a steady bombardment of enemy positions, routes, or supply and communications lines for the purpose of delaying and disorganizing his progress." The very use of this term, given the foregoing meanings, implies we have "declared war" upon an "enemy" whose only sin is that they seek refuge from persecution or, at worst, a better and safer life in the United States. Is "interdiction" the term which we wish to apply to part of a national policy of dealing with refugees? I think not.

We are told that our Coast Guard vessels would intercept certain "suspicious" boats far from the shores of the United States and board such boats to check on the immigration status of any passengers destined for the United States.

The first issue that comes to mind concerns the place of interdiction. We are told that the interdiction would occur outside the territorial waters of the United States. If such interdiction were to occur inside the territorial waters of another nation with that nation's consent and permission (perhaps after the execution of a binding bilateral agreement between the United States and such other nation), then the process would be less objectionable from an international law point of view. If no such agreement existed, then the United States would have seriously violated the sovereignty of such other nation.

If the interdiction occurred on the high seas, by what right has the United States stopped and boarded the vessel? Perhaps if the interdicted vessel were a United

States flag vessel subject to the jurisdiction of our laws, authority to board and search could be found. A similar result might obtain if the interdicted vessel flew the flag of another nation with whom we had a treaty or written agreement which provided for such interdiction. But if the United States seeks to interdict vessels of other nations, not parties to any such agreements, then we risk provoking major international incidents and would surely suffer the resulting blow of world opinion.

In addition, we are forced to analyze what would create "reasonable suspicion or belief" or "probable cause" which would warrant interdiction of a vessel on the high seas or within another nation's territorial limits. How will our Coast Guard know if the ship contains passengers who will seek to enter the United States; or even whether or not the ship is bound for our country in the first instance? If this type of information is being obtained by the United States from the official communiques of the friendly foreign nation or from our own intelligence gathering facilities, would it not be the better policy for the United States to encourage the other nation to stop the exit of the vessels from its own shores, rather than have our Coast Guard interdict the vessel? In any event, it would appear that we would be abandoning our own highly-valued constitutional principles of protection against unreasonable search and seizure as soon as our Coast Guard cutters left our territorial waters. Is this the message and impression we wish to convey to the rest of the world?

Unless the policy of interdiction will be applied uniformly to vessels of all nations (and that seems to be

unlikely and unenforceable without serious international conflict), we will undoubtedly be accused of unfairness in our application of the policy. For example; if we only interdict vessels originating from Haiti containing black Hatians, we will be accused of carrying out a policy which will be labeled "RACIST", an accusation we should surely avoid at all costs.

Finally, with regard to the interdictive act itself, i.e., the stopping and boarding of the suspicious vessel, what do we propose to do if the master of the vessel refuses to allow his ship to be stopped or boarded? Will we physically block the vessel (a dangerous and usually impractical task at sea)?; fire shots over its bow?; or simply sink it? In very recent history, the experience of the interdiction of boats of refugees fleeing from troubled areas in Southeast Asia by nations who would not allow the refugees to enter should teach us a lesson, for many of those boats sank, their refugee-occupants drowned, and other were set adrift at sea, never to be seen again. In an era when it is so important to the United States to prove to the rest of the peoples of the world (particularly Third World nations) that our principles of democracy and concern for human rights are not just hollow words of propoganda, but are living watchwords signifying a better form of government and life, we cannot afford to allow persons claiming to be fleeing from persecution to drown at sea or starve to death on small boats, simply because we have bigger ships or more powerful guns and some distant bureaucratic process has decreed that their boats should be turned around.

Our history, though glorious in most respects, is blotted with similar instances of lack of concern for the

plight of those seeking a safe harbour from persecution and death. While these very hearings are being held, countless Americans and foreign citizens are being exposed to the watching of a current popular motion picture about the true story of United States "interdiction" in an earlier era--the turning away without hearing from our shores of large boats filled with Jewish and other refugees fleeing Hitler's persecution and the subsequent dehumanization and death of such persons. We simply cannot afford to allow another similar experience to happen if we, in good conscience, want to continue to believe that we are bound by simple basic principles of our Judaeo-Christian heritage.

Assuming we can stop and board these vessels, what do we do next? The Administration proposal is that some sort of "asylum officer" will screen the passengers to determine if they have "legitimate" asylum claims.

We are not yet advised as to which government agency the asylum officer will be assigned. If the asylum officer is not well trained in the adjudication of asylum claims, unfair and horrible results will undoubtedly flow from his or her decisions. Training in this area requires a thorough knowledge of the United States statutes and regulations relating to asylum claims, as well as a thorough knowledge of the judicial and administrative interpretations of such statutes and regulations, in addition to an understanding of the United Nations Treaty and protocols relating to refugees.

If these asylum officers are stationed on board Coast Guard vessels, sufficient translators or interpreters must also be available for communication purposes. Will we be expected to staff these Coast Guard ships with sufficient

interpreters to speak every language conceivable, so that when potential asylees are encountered, they will be able to properly communicate with them in their native languages? How many asylum officers will each Coast Guard vessel contain? If one Coast Guard cutter encounters a large vessel containing, for example, 200 refugees, can one asylum officer possibly give enough time to each of their individual claims to make a fair and humanitarian decision in each case? What records will be kept of these proceedings to determine if the asylum officers are fairly adjudicating claims? These are fair questions with which the Congress must deal in reviewing any legislation concerning these issues.

The granting or denying of a request for asylum is an extremely serious matter. Often people flee persecution on very short notice and do not bring with them documentation which could ultimately be obtained to establish their claims for asylum. If, after arrival in the United States, an asylum claim is to be filed, documentation can often be gathered to help substantiate the claimed persecution. If, however, asylees are expected to be able to substantiate their claims to an asylum officer on board a ship at sea, with no opportunity to gather the type of proof or documentary evidence necessary to establish the claim, then wrong results will flow from this superficial attempt to provide an indicia of due process, when in fact none exists. Again, this would undoubtedly violate the spirit, if not the letter, of our laws and the United Nations treaties to which we subscribe.

If the asylum claimant is unsuccessful in persuading the asylum officer of the bona fides of his or her claim at sea, there will obviously be no practical appeal from

this decision. I simply do not trust the asylum officer, who would not be subject to judicial review under the proposals currently being discussed, to make a fair determination in what are often life-and-death circumstances. My recent experience with representation with the Cuban detainees at the Atlanta Federal Penitentiary is replete with instances of abuse of the administrative procedures which were ostensibly designed to provide for fair hearings. The attached Memorandum dated October 6, 1980, from Immigration Judge T. P. Jakaboski points out the extremely unfair circumstances and conditions which surrounded the handling of asylum claims for the detained Cubans in the Federal prison system. Judge Jakaboski, who heard many of these asylum claims personally, insists that the Department of State issued a series of "canned" responses to each of the detained Cubans, without considering the facts and circumstances of each individual case. He was also concerned with the fact that nearly all of the requests for asylum were prepared by employees of the Immigration and Naturalization Service who, in many instances, have been shown to have unfairly written up the English language statements for the signature of unsuspecting Cuban detainees. He states that "the deficient information initially gleaned meant that the advisory opinion of State, as well as the District Director's denial, are questionable because are based on inadequate data. . . . The overall paperwork and processing of the incarcerated Cubans, as I have outlined above, is of dubious quality and appears to have been accomplished perfunctorily. Consequently, the Service runs a strong risk of successful attack in Federal court, along the lines of the successful attack in the [Haitian Refugee Center Cases], where the

District Court threw out all our work in 4,000 Haitian cases. The cost, if the Cuban cases are likewise thrown out, would be astronomical." Judge Jakaboski has subsequently charged the Central Office of the Immigration and Naturalization Service of unduly interfering with the Immigration Judge's decision-making authority in a number of respects, including the application of intense pressure on Immigration Judges and INS Trial Attorneys to denying the asylum claims of the detained Cubans. INS has even been accused of having been provided with all of the Immigration Judges hearing the Cuban cases with pre-printed decisions denying the asylum claims and upon which the Immigration Judge only had to fill in the name of the Cuban-applicant and his file number.

The pressure put on Immigration Judges by officials acting in behalf of the Attorney General further indicates the need for an independent immigration judiciary. But, rather than press for the independence of Immigration Judges, there have been a series of recent proposals at INS for periodic "reviews" of the work of Immigration Judges--reviews which would further destroy the integrity of the system. Many commentators have been pressing for the creation of an independent immigration judiciary, and I wholly support this view. If the Immigration Judges are not themselves free from pressure from the agency whose very decisions they are charged with responsibility to review, how can we expect an asylum officer to be free of the same kinds of pressures? As Judge Jakaboski points out, it is necessary for the person making the determination on an asylum claim to be thoroughly familiar with the conditions in the country from which the asylum claimant is fleeing in order to make a fair analysis of the asylum

claim. The creation of these so-called asylum officers is merely a thin subterfuge at an attempt to provide a gloss of fair and due process, when in fact none will exist.

I also understand that the administration is proposing certain legislative and administrative changes with regard to the detention of aliens who come to the United States seeking refuge from persecution and whose claims are in process. The press reports indicate that the Administration seeks to make it "so unpleasant" for an alien to come to the United States to apply for political asylum, that few will seek to do so in the future. The Administration thereby seeks to "deter" such future applicants from attempting to reach our shores. The experience with the Cuban detainees is an example of why such system is inhumane and unworkable. We discovered a number of Cubans in the prison population in the Atlanta Federal Penitentiary whose only "crimes" had been for the conviction of purely political offenses in Cuba. For example, one of the Cuban detainees was a medical student in Havannah who, some fourteen years prior, had been arrested and imprisoned with a lengthy sentence because he belonged to a democratic political organization which had been outlawed by Fidel Castro and which sought the overthrow of the Communist government in Cuba. Upon his arrival in the United States, he proudly admitted his prior conviction in Cuba, thinking that he would be treated as a hero in our country. Instead, he was incarcerated for some fifteen months in the Atlanta Federal Penitentiary as an "excludable alien who had previously committed a crime involving moral turpitude." It was not until the intervention of a humane federal district judge that the man was finally released. This is but one example of numerous similar cases we have uncovered.

I believe that it would be proper to establish federal centers for the housing of large numbers of refugees who reach our shores seeking political asylum, so that these persons may be housed in sanitary conditions until their claims can be swiftly adjudicated. There should, however, be some limit put upon the INS to render decisions in their cases, lest these persons remain the federal facilities for lengthy periods of time. The centers should not be jails or maximum security federal penitentiaries, nor should they be in remote areas without access to relatives, volunteer agencies, and attorneys.

Under one proposal being currently debated, an asylum inquiry officer would hear the claims of those persons who reached our shores. No attorney would be allowed to participate, and there would be no appeal (unless the Attorney General requested to certify the case to a higher authority). This proposal is inherently unfair and would probably violate the terms of the United Nations treaties concerning refugees.

I would propose that a federal judicial officer be assigned to hear the asylum claims of all within our borders who seek political asylum. Perhaps the United States District Courts can be authorized to hear these claims (either in the first instance, or after the exhaustion of administrative remedies), with authority being granted to the District Judges to delegate the hearing process to federal magistrates for factfinding and recommendation. In that manner, over a period of a few years, we could build a knowledgeable corps of federal officers who could adequately and fairly handle the asylum claims. Presumptively they would in no way be prejudiced or predisposed to decide a case in favor of either the applicant or the

government. Using this process, a true adversarial proceeding before an impartial judge or magistrate could be effected.

If the Congress chooses to go along with the current proposal to have administrative asylum inquiry officers (other than federal judges or magistrates) hear the asylum claims, then surely Congress should allow an appeal from any determinations made by such inquiry officer. I would recommend that the appeal be first to the Board of Immigration Appeals, and then to the United States Courts (preferably to the Federal District Courts). In this manner we can assure that a fair judicial analysis will be made in each and every case.

There has also been some discussion that the Administration will propose that an alien who enters the United States without a proper visa would have only fourteen days to apply for political asylum. If the alien does not apply within the fourteen day period, they would only be allowed to request political asylum based on facts or circumstances which changed since the expiration of such fourteen day period. As a threshold issue, how can the alien seeking refuge, who often does not speak or read the English language, even know about this absurd rule? While all of us are charged with the responsibility to know what the law is, it is ludicrous to presume that an alien who entered the United States only a few weeks prior to the expiration of the this important period of time will know about this rule and take action pursuant thereto. Under our present system, if an alien enters the United States (with or without proper documentation) and is called before an Immigration Judge in a deportation or exclusion hearing, he can assert a claim for political asylum at

that time. The deportation or exclusion hearings are continued, and the asylum claim proceeds to adjudication. Under the new proposals aliens would have no such rights if they did not file the asylum claim within fourteen days subsequent to their entry into the United States. Again, this would clearly violate the United Nations treaties to which the United States is a signatory and would undoubtedly be declared invalid by our Federal courts.

In dealing with political asylum claims we have a moral duty to provide a fair and adequate hearing and proper administrative and judicial process, because we simply cannot afford to make mistakes. All of us remember the incident which occurred in 1970 which received worldwide attention when a Lithuanian seaman, Simas Kudirka, jumped off of his Soviet vessel and attempted to defect to the United States after placing himself in the hands of our Coast Guard on a ship off the coast of New England. The Coast Guard returned Kudirka to the Soviets and he was tried for treason and sentenced to ten years in a concentration camp. He was freed in 1974 because of the efforts of the United States government and particularly a member of this Senate, when it was determined that his mother had been born in the United States. That example of "interdiction" in action and the swift and erroneous decision of our government to return asylee to the Soviets caused outrage, not just in the Senate, but throughout the world. Nevertheless, that is exactly the type of result that can be expected when untrained asylum officers are expected to make snap judgment decisions without the benefit of documentary evidence and due process hearings.

I am aware of some sentiment for and discussion about the proposal to take the Department of State out of the

business of rendering advisory opinions in asylum cases. It would appear that often these opinions are based on political rather than factual analyses and that once a decision is reached to grant or not grant a favorable advisory opinion with regard to a group or groups of people from a particular country, it seems that all the members of the group are issued the same type of printed, mimeographed, or electronically processed advisory opinions by the Department of State, often with little regard for particular factual circumstances in any given case. Perhaps this is due to a severe lack of personnel within State to adequately process a large number of cases received at or near the same time. The solution here, however, would be to provide State with adequate personnel to thoroughly review each and every individual claim filed with them. I am not in favor of taking the Department of State out of the advisory opinion role that the Department now plays in the asylum process. However, State should be encouraged to more thoroughly review the particular circumstances of any individual asylum claim, and the Department of State's advisory opinion should be merely one additional piece of evidence to be considered by the officer adjudicating an asylum claim. The State Department advisory opinion should not be the last word or authoritative statement on the case. At the present time, it has been my experience that in the overwhelming majority of cases, the INS merely rubber-stamps the decision of the Department of State, thereby elevating the advisory opinion to a final adjudication. If the proposal I suggested above, i.e., to allow District Judges and magistrates to handle asylum cases, is approved, then the adjudicating officers could review the Department of

State's opinions and include them in the record of proceedings.

Unfortunately, our immigration laws and regulations are extremely complex and are not often understood by even sophisticated judges and attorneys who are called upon to deal with them. Frustration with the complexity of the system was recently expressed by the United States Court of Appeals for the Fifth Circuit in the case of Kwon v. INS, No. 79-2850, May 4, 1981, in which the en banc majority of that court stated:

In its brief the INS states 'the public, of course, has a right to obtain guidance from the regulations for its dealings with the Service.' We devoutly hope the INS and those who draft the regulations an Operations Instructions under which it operates will take this statement to heart. Whatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon. There is nothing esoteric about the subject matter. The regulations concern simple matters of great concern to human beings, most of them of limited education. They should be so written as to be comprehensible by intelligent laymen and unspecialized lawyers without the aid of both lexicon and inter-circle guide.

In the same case, the dissenting judges stated that

" . . . [T]he INS regulations are incomprehensible. There apparent internal inconsistencies defy comprehension by even the most learned in our society. . . . Consider further that the individuals whose responsibility it is to define some sense from these regulations are the aliens themselves. These are not legal scholars; they often are poor, uneducated individuals, barely conversant in what to them is the foreign language of English. It seems to [the court] that the INS regulations and internal operating rules that instruct INS agents to provide applicant aliens

with certain information were created with the knowledge of these unequal positions in mind. Though the personnel within INS are being asked to perform the impossible in many parts of our country, the law requires them to follow the rules set down for the performance of their job."

Having dealt with a number of United States and state regulatory agencies in the years that I have practiced the profession of law, I can unequivocally state that I have never observed any agency or governmental unit so pathetically understaffed, overworked, and underbudgeted than is the United States Immigration and Naturalization Service. All pleas for staff and funding seem to be ignored. Often United States citizens have to wait as long as five years for the simple adjudication of a petition seeking to bring a close relative to our country to join their family. Often this is not due to any quota backlog, but merely due to administrative delays because of the lack of adjudication officers, clerks and typists, computer systems, adequate recordkeeping facilities, and reasonable budgets within which to administer an important part of our federal government. Until these ills are remedied, there will be inherent delays and unfairness in the entire system--particularly those aspects of the system which concern the granting of asylum and the processing of refugees. A number of the proposals put forth by the Administration will serve to worsen--not better--an already overtaxed and burdened administrative system. The policy of interdiction, if implemented, will only serve to aggravate an already untenable situation.

Perhaps due to present economic conditions, the United States can no longer be the haven for all who seek refuge from persecution. Maybe the torch of the Statue of

Liberty cannot burn quite so bright as it has in the past;
but we should not try to extinguish it altogether!

In closing, I would like to thank the members of the
Subcommittee for allowing me to present my views today.
Perhaps it may sound trite, but the words of the poet
Edwin Markham which were oft quoted by a former Commis-
sioner of INS are appropriate at this time:

He drew a circle that shut me out--
Heretic rebel a thing to flout
But Love and I had the wit to win:
We drew a circle that took him in.

Memorandum

H C F



CLP 91/1-C

Subject	Date
Cuban processing	October 6, 1960
To	From
Durward E. Powell, Jr. Regional Commissioner Southern Region	T. P. Jakubowski Immigration Judge El Paso, TX

On September 29, 1960 I had an opportunity to convey to Acting Commissioner Crosland my misgivings about the correctness and effectiveness of INS processing of those "Freedom Flotilla" Cubans incarcerated in the Federal prisons. Inasmuch as the Cubans behind bars are predominately located within the Southern Region, Mr. Crosland asked me to put my points down on paper and forward them to you as the responsible official. It was Mr. Crosland's expressed desire that the system function properly with room for people in the field who find something wrong to pass this information up through channels so that it may be taken into consideration and corrective action taken if deemed necessary.

I regret burdening you with a lot of complex and technical material, but rest assured it is submitted with a sincere desire to be helpful and constructive.

My misgivings with the Cuban program can be summarized as follows: (1) the statements and asylum applications filled out during interviews at the various camps appear suspect -- both because of questionable language ability on the part of the interviewers and also because in most cases both documents failed to delve thoroughly into the likelihood of persecution; (2) because of this shortcoming, the advisory opinions from the Assistant Secretary of State for Human Rights and Humanitarian Affairs turned out to be of little utility in deciding Cuban asylum cases; (3) the judges sent to hear the exclusion/asylum cases were handicapped by the absence of material on Cuban jurisprudence and political affairs; and (4) the experience of several judges confirms that a significant number of Cuban nationals confined to Federal correctional institutions could possibly be released without significant danger to society if carefully screened in an informed, objective and practiced fashion.

Before going into specific examples, it will be well at this juncture to discuss some of the legal problems encountered in Cuban cases.

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The Refugee Act of 1980 amended Section 243(h) of the Immigration and Nationality Act to say there would be no withholding of deportation because of persecution if returned home, under paragraph (C) "where there are serious reasons for considering that the alien committed a serious non-political crime outside the United States prior to arrival of the alien in the United States".

This "serious non-political crime" language matches and obviously is taken from Article 1F of the 1951 Convention Relating to the Status of Refugees, which, in subparagraph (b) bars asylum to an alien if "he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee".

The State Department, in a series of "canned" responses, said, in most cases, that "we believe that the applicant has committed a serious non-political crime prior to his arrival in this country", and "thus, a claim for asylum under the U.N. Convention and protocol has not been established". (See Exhibit A for an example.)

How accurate is this statement? On the basis of a sample of Cuban cases, it would appear insufficient to take at face value because State was not aware of and did not consider such information relating to potential persecution.

In the only example I have within reach (in the case of Hernandez-Cruz, A22 775 379), the statement taken at Fort Chaffee, Arkansas consists of a scant 11 lines, (Exhibit B). Nothing was asked about possible persecution. Evidently the interviewer felt the job was complete once there was mention of a crime. Also, the statement neglects to cover the point that the conviction was before a Revolutionary Tribunal (i.e., Communist Military Court), whose jurisdiction by statute is limited to political offenses, including some economic crimes deemed political in Fidel Castro's Cuba. See page 100 and 139 of "Cuba and the Rule of Law", International Commission of Jurists, Geneva, 1962 (Exhibit C).

Thus, Revolutionary Tribunals are separate and apart from the ordinary courts of competent jurisdiction in Cuba. Their procedure is a throwback to the 1896 Martial Law (p. 133 of Exhibit C). There is no appeal and the judgment is carried out posthaste (Exhibit C, p. 135). Yet, in scores of cases the so-called "conviction" was the product of just such a military court.

In the first decision in which I granted asylum (and thus the only one I have at hand), *Patler of Hernandez-Cruz*, A22 775 375, August 25, 1980, an oral decision, dictated immediately upon concluding testimony, I mentioned, page 4 and 5, that the disproportionate sentence received for stealing pants probably resulted from being heard by a Revolutionary Tribunal (Exhibit B). On page 2 I found the conviction adequate to bring Section 212(a)(9) into play, but upon reflection, and after seeing Exhibit C, I am no longer of that opinion.

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Further, and illuminating, examples of the workings of Castro's Revolutionary Tribunals can be found on pages 131-140 and 152-181 of Exhibit C. An examination of those pages should convince you that United States officials would be unwise -- and might unwittingly be serving Fidel Castro's anti-capitalist purposes -- to put too much stock in a Revolutionary Tribunal conviction.

A more critical attitude is required, and can only come about through adequate briefing and/or provision of the requisite background material on Cuban law and Communist tactics.

Besides the skimpy statements common to these cases, the State Department also had available the alien's application for political asylum on Form I-589 which was actually filled in by the same interviewers. (See Exhibit E for an example.) In the example given, nothing of substance was included other than the one line statement "Grandfather has been a political prisoner (sic) for the last 21 years". Absent is the fact the alien was raised by his paternal grandmother (wife of the prisoner), that she inculcated a strong Christian faith in him, and that he (and she) was hounded and harassed because of it. The alien's social position in the petty bourgeois (his grandfather was a Batista policeman involved in the capture of a noted Communist) was not developed as it should have been.

Incidentally, it would facilitate communication and avert repudiation or later attack on the statements if they were to be taken down in Spanish (as is sometimes done in El Paso in important cases to preserve vital testimony). Sometimes the excuse given for not doing this is that the interviewer's Spanish is inadequate. Yet how can such an officer understand enough to do it in English? There are many tests for evaluating a person's ability in a foreign language. These should be administered to all personnel using Spanish on the job -- not only Patrolmen and inspectors -- but even interpreters and interviewers.

The U.S. Handbook (see Exhibit F) contains other guidance: paragraph 155 states that in the context of Article 1F, "a 'serious' crime must be a capital offense or a very grave punishable act". It goes on to state that "Minor offenses punishable by moderate sentences" do not bar consideration for asylum.

In the case of Hernandez-Cruz, supra, and that of most of the other Cubans behind bars, there appears to have been a tendency to judge the seriousness of the offenses by reference to the sentence alone -- as if a military court could abrogate the approach of paragraph 155 simply by dishing out a disproportionately heavy sentence. The better view would be to consider what a comparable sentence would have been likely under ordinary Cuban law or under United States law. Otherwise, again, we will be duped into perpetuating an injustice perpetrated by Castro.

Another important point, one which was recognized by the Board of Immigration Appeals in Matter of Rodriguez-Palma, A22 792 793, August 26, 1980, (Exhibit G) is that the decision whether or not a particular offense is or is not a "serious

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non-political crime" requires a balancing of the degree of criminality against the degree of anticipated persecution.

As the BIA noted, this stems from the provision of paragraph 156 of the "Handbook on Procedures and Criteria for Determining Refugee Status", put out by the office of the United Nations High Commissioner for Refugees, Geneva, September 1979 (Exhibit F). The text follows:

"156. In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a bona fide refugee."

There is a rule in immigration practice that we do not "go behind" a conviction, for purposes of determining whether a crime involving moral turpitude has been committed. Out of inertia or a failure to discriminate, it appears that in assessing the seriousness of crimes for which the Cubans were convicted, the same rule was relied upon. That is, the fact of conviction was taken as sufficient unto itself by the interviewers, the Department of State, and by District Directors who initially turned down the asylum requests of the incarcerated Cubans.

However, the wooden transplantation of the "don't-go-behind-the-conviction-rule" is incorrect. Note the U.N. Handbook, which sets forth the following in paragraph 157:

"157. In evaluating the nature of the crime presumed to have been committed, all the relevant factors--including any mitigating circumstances--must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates."

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A further complication in the processing of the Cubans is that a widespread linguistic deficiency was disclosed. Although Anglo-Saxon inspectors or Border Patrolmen may be able to carry out their normal duties with a few thousand standard terms in their Spanish vocabulary, they came up short in dealing with Cubans who have their own peculiar version of Spanish quite different from the Mexicans. Even Mexican-American personnel were pushed to their linguistic limits, and beyond, in trying to deal with the Cubans.

As a result, it came out during many hearings that the officials doing the interviews frequently misunderstood the Cubans.

During the exclusion hearings themselves, the judges have been hampered and slowed down by the amateur level of interpreters provided.

Also, apropos the hearings, a careful judge interested in providing a full and fair hearing on the asylum claim finds himself forced to, in effect, conduct the first in-depth interview on the asylum question -- a process which may take a full day or more. That is, the earlier interviews turn out to be worse than useless, being misleading as well as incomplete.

If the interviews were better, the adjudication process in the exclusion hearings could be speeded up to decide 6 or 10 applications a day!

Moreover, the deficient information initially gleaned meant that the advisory opinion of State, as well as the District Director's denial, are questionable because based on inadequate data. The same is true of the BIA, as in Matter of Hernandez-Sanchez, A22 747 071, September 1980, Exhibit H, they accept the initial interview, asylum application and State Department advisory opinion uncritically.

Likewise, the use of a form order incorporating this malady, as was suggested by Mr. Schmidt at the General Counsel's office, merely would serve to encrust these deficiencies in the decisions on asylum.

The general rule, in conformity with the general principles of fairness and due process found in the Administrative Procedures Act is that the government may not rely upon an unpublished precedent. Yet this is precisely what was done when Mr. Dixon rushed copies of Matter of Hernandez-Sanchez (Exhibit II) to the judges. This apparent violation of the APA, in which a hard-nosed BIA decision treated the dubious paperwork as gospel, was placed before the judges could be construed as an attempt to shove the judges into compliance, at the cost of full and fair individualized consideration of the asylum claims.¹

¹ Although not strictly germane, it should be noted that both Rodriguez-Palma and Hernandez-Sanchez appeared to relate to hardened ordinary criminals rather

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to middle-class opponents of Castro, who were not recognized yet by the CIA.

In short, the zeal on the part of many personnel may turn out to have been excessive if a court accepts the Haitian analogy and throws out the decisions rendered in these Cuban cases. Doing it right in the first place, hence, is the most economical and efficient way to proceed. Any deviation from normal procedures presents a red flag to the Federal courts.

The overall paperwork and processing of the incarcerated Cubans, as I have outlined above, is of dubious quality and appears to have been accomplished perfunctorily. Consequently, the Service runs a strong risk of successful attack in Federal court, along the lines of the successful attack in the case of *Haitian Refugee Center vs. Civiletti*, where the District Court threw out all our work in 4,000 Haitian cases. The cost, if the Cuban cases are likewise thrown out, would be astronomical.

Use of the recommended form order would appear to tend to support the claim of any Cuban plaintiff in a suit similar to that of the Haitians.

I am not familiar with the background and performance of the "Acting" Judges. Accordingly, I am in no position to comment, except to say that their hiring would have been superfluous if the asylum cases were sufficiently thoroughly developed prior to the exclusion hearings.

Alright, where does all this leave us today? Perhaps it is too late to lock the barn door, but allow me to pass on the ideas that I came up with after considerable discussion and reflection.

First, in support of the Immigration Judges' efforts -- there are many types of legal material dealing with the U.N. Convention (such as Exhibit C and Exhibit F) and also on Cuban law that could be obtained and rushed to the judges. The Library of Congress could be a major source.

Second, to understand the worth of an asylum claim, the Trial Judge must need to have at least a basic understanding of the internal politics and ideology inside Cuba. An excellent, and inexpensive, source is the *Area Handbook for Cuba*, obtainable at the Government Book Store, Department of State, Room 2017, Washington, D.C. 20520; at a price of only \$8.60.

Third, in view of the dismal record of our own "interpreters" (which ought to figure into any long-range discussion of the question of effective handling of the Mexicans as well), if at all possible at this late date, consideration ought to be given to hiring temporary "processors" or "case managers" from among native Cubans living in Miami or elsewhere. They must, however, be educated people quick enough to give a good account of themselves. Teachers, social workers, or government officials might be logical choices. If they

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could reduce a Cuban's asylum claim to paper -- even if it takes them a day to do it -- the judges can dispose of them in as long as it takes to read the material, thereby speeding up the process considerably. If deemed advisable, such temporary employees could even adopt the stance of "representative" of the Cuban prisoners.

This would obviate stripping districts such as El Paso of its Trial Attorneys, sending them to serve the new "Acting" Judges. This leaves the El Paso judges without Trial Attorneys, causes cancellation of details to handle Iranians and disrupts the orderly handling of the normal docket. Emergency measures are fine, but is this necessary?

Lastly, inasmuch as there is widespread agreement among the Immigration Judges that a large minority of the Cubans in prison do not really belong there, it might be expedient -- as well as fair and proper -- to consider setting up a special panel to review the files of the prisoners, with an eye to deciding which ones can safely be released. At present, I am afraid, we may have been caught up in the misconception that all the Cubans in prison are hardened, ordinary criminals. A panel knowledgeable in Cuban law and politics might take a more valid approach, and in so doing recommend the release of 20 or 25 per cent of the prisoners.

If you wish, I would be willing to volunteer for such a panel. Without meaning to be presumptuous, you might consider other judges with a feel for complex legal and political matters, such as Judge Cohn in New York, Judge Hornbach in San Francisco, or Judge Armendariz in El Paso. There are exceptional former Immigration Judges who might be approached to come back on duty for a week for this purpose, such as Chester Sipkin, Monte Krol, or Bill Fliegelman. Also, you might consider Mr. Maurice A. Roberts, former Chairman of the BIA or ex-General Counsel Charles Gordon, both of whom are energetic men with very keen minds, plus mature wisdom.

Please feel free to contact me by telephone or to invite me to Dallas for consultation if you have the slightest question.

cc: Acting Commissioner Crosland

Senator SIMPSON. Thank you very much, Mr. Schwartz.
Mr. Stanley Mailman. How are you, sir?

**STATEMENT OF STANLEY MAILMAN, ESQ., REPRESENTATIVE,
LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS**

Mr. MAILMAN. Thank you. Mr. Chairman, I want at the outset to thank you on behalf of the Lawyers Committee for International Human Rights for the opportunity of presenting its views. Its written presentation, I know, will be made part of the record. That is, I respectfully ask that it be made a part of the record.

Senator SIMPSON. Without objection, so ordered.

Mr. MAILMAN. I should also ask on my own behalf if a copy of an article which I recently wrote for the New York Law Journal, a copy of which I presented to the staff, could also be made part of the record. It is dated October 7.

Senator SIMPSON. It certainly will.

Mr. MAILMAN. It deals with the policy on Haitian refugees.

I should tell you at the outset that the burden of the concern of the Lawyers Committee is that in addressing the problem of the mass influx of refugees, on which this committee and the administration have expressed themselves—in the case of the administration, so forcefully—we are concerned that we lose sight of the individual who is seeking asylum.

Our greatest concern is that in fighting the myriad of problems that are posed by the mass asylum situation the committee and the administration may lose sight of the problems of the individual applicant who may very well be—with all of the doubts we have—a true refugee whose return to Haiti or some other country may indeed be a death sentence, as another member of this panel has suggested.

It is because of that, that we are particularly concerned with the procedural rights which the administration wishes to curtail. If indeed the individual is deprived of any hearing in the customary sense, our concern is that somebody, who in the best of faith and who in the worst of a world that he may be finding back home, may indeed face execution or imprisonment solely because of his political beliefs.

Now, what are those procedural rights? Even before the Refugee Act of 1980, the Immigration Service recognized the need for a hearing in its own regulations and provided for a hearing—that is on the question of asylum—in connection with an exclusion or a deportation hearing.

Particularly important is the opportunity to have counsel. With some experience in the situation of the Haitians now before us, the need for counsel is particularly important—important because these are people who are so frightened of anybody who looks official that they have an awful lot of trouble in simply expressing themselves, in expressing the fear that they have, in getting out the details of what they are going to face.

Beyond that, our concern is with the independence of the people who are going to be making the decisions. Again, we have been talking about expedition, the need to streamline procedures. There has been an awful lot of emphasis on that.

That emphasis reminds me very much, again, of the findings of fact which were made by Judge King in Haitian Refugee Center, the case which has been alluded to earlier. There is just a series of horror stories in connection with that—that is in the findings made by the judge.

I have reference to the fact that when the Immigration Service decided in 1978 that it had a backlog, it approached that backlog by handing over these thousands of cases to so-called adjudicators, saying, "We want you to run these through quickly." The word was out, it is very, very evident by the findings of fact that indeed the judge found very specifically that the adjudicators were in effect told, "You have to find that these people are not refugees."

Two things worked hand in hand. One, that the adjudicators were not well trained.

Two, they knew that their mission was to run through the cases quickly and to deny them.

So, it is very hard to have a great deal of confidence—in going back, when I talked about "adjudicators" in the previous situation I was talking about administrative adjudicators—it is very hard for us to concede now that cases are going to be decided by administrative adjudicators under the supervision of the Immigration Service with any sense of fairness.

So, one of the recommendations that we would make—and without knowledge of the suggestion that was made by Mr. Schwartz, which is very intriguing, that there be an international system of adjudication—the one we would put before you is to have a political asylum officer, well trained, of course, but under the supervision of a board, an independent board which would have other functions. One of the functions would be that of review.

But it would be particularly important that these asylum officers not be creatures of the Immigration Service but rather be administrative officers whose actions would be reviewed by an independent board that would be established for the very purpose of concerning itself with policy; with monitoring the systems for adjudicating cases; and for having a general overview of the problems that you are concerned with and which presumably you do not want to legislate about every day.

If I have just another moment, I would like to mention some of the other recommendations. We too think that the State Department in the interest of streamlining the procedures should have a lesser role in the matter of adjudications.

We would maintain the definition of a refugee as it is currently established in the U.N. Convention, and in the Refugee Act of 1980.

We would also ask that the provisions of section 243(h) of the act be retained as a safety net for those who would actually face death or imprisonment because of their political or religious beliefs.

Thank you.

[The prepared statement of Mr. Mailman with attachments follows:]

PREPARED STATEMENT OF STANLEY MAILMAN

Introduction

My name is Stanley Mailman. I am a practising lawyer, a former president of the America Immigration Lawyers' Association and the monthly immigration law columnist for the New York Law Journal.

I am appearing here today on behalf of the Lawyers Committee for International Human Rights. The Lawyers Committee is a public-interest law center that seeks to promote international human rights law here and abroad. For the past three and a half years the Committee has focused particular attention on U.S. refugee and asylum policy with special reference to our international legal obligations.

I have been asked to testify here today on adjudication of political asylum applications and to comment on both the existing structure of this process as well as the Administration's proposals for change. Before examining these issues it is perhaps useful to consider what a refugee is and why people seek refuge in the United States or elsewhere.

In determining refugee status, it is important to realize that the vast majority of migrants do not leave their country unless forced to do so by extreme circumstances. Although many factors may compel a person to flee a country, the Refugee Act of 1980 as well as the United Nations Convention and Protocol relating to the Status of Refugees recognize that refugees are set apart from other migrants because their primary motivation for leaving their home country is a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.

This strict definition of persecution is distinguishable from punishment that is imposed for a violation of

the laws of a particular country. In general a fugitive from justice is not a refugee. Persecution also must be more than purely economic deprivation. However, if that deprivation has a political basis an individual applicant may well qualify under the refugee definition.

Compliance with the letter and spirit of the 1980 Refugee Act definition requires a sensitive fact-finding process and a careful understanding of the motivations, beliefs, background and experience of each applicant. Examination of these factors is particularly difficult because many asylum applicants do not speak English, and almost none are familiar with American legal procedures or customs. An individual applying for political asylum in the United States is often deeply fearful and suspicious of government officials. This can lead to a refusal to engage in an open discussion of the circumstances of his case, which is so important for its just resolution.

In discussing these issues today, we recognize that experiences of the last 18 months necessitate a close examination of the immigration problems now confronting this country. This summer, hearings were held before this and other subcommittees in Congress examining problems created by the mass influx of Haitians, Cubans, Salvadorans and others to this country in recent years. Unfortunately, the discussion of emergency situations created by the Cuban/Haitian influx in 1980 and 1981 has confused the discussion with regard to the proper manner in which individual political asylum claims should be adjudicated. Concerns for efficiency and expedition have overridden and often obscured equally important concerns for due process and just handling of individual cases.

In appearing here today, our greatest concern is that, in confronting the myriad of problems posed by mass asylum, neither this Committee, nor the Administration loses sight of the needs of the individual applicant for political

asylum or the individual refugee fleeing persecution. It may be that a substantial number of those taking part in recent mass exoduses are not refugees under the international standard adopted by the United States. We believe, however, that many of these individuals are bona fide refugees. We must not let our need to control immigration interfere with our desire to aid those who are refugees and to protect them against forced return to persecution. Thus, as we consider ways in which we can make asylum procedure more efficient, we must also ensure that they are just and equitable, and while we need to be duly selective in admitting refugees we must also take the necessary steps to abide by our international and constitutional legal obligations as well as our humanitarian ideals.

Considering these basic principles, our statement here today seeks to analyze some of the Reagan Administration's proposed approaches to the problem of mass asylum; and to present a series of recommendations for reform of the present system. In testimony before this Subcommittee in July, Doris Meissner, Commissioner of the Immigration and Naturalization Service ("INS"), outlined a series of administrative changes that have been and will be proposed by the Reagan Administration in an effort to respond effectively to the problem of mass asylum. Included in this package is a proposal that new legislation be enacted "to reform and streamline asylum and exclusion procedures." In her testimony Ms. Meissner outlined several changes that the Administration will advocate. First, aliens arriving in the United States without documentation would have their claims for asylum reviewed only by immigration officers. Under this proposal, adversarial hearings, right to counsel, administrative appeals and judicial review would be eliminated or sharply curtained.

We are seriously disturbed by this proposal which we believe undermines the basic due process protections that

have in the past been afforded to those seeking political asylum. Considered together these changes would greatly jeopardize the chances of achieving a proper resolution of the individual case. By eliminating the traditional hearing, the Administration's proposal denies the opportunity to present and challenge testimony and other evidence so often necessary to a well considered decision. Indeed, in our system, we count heavily on the give and take of a hearing to develop the truth. A lawyer often serves to help focus the applicant to the relevant facts and issues and to clarify evidence demonstrating a fear of persecution. The United Nations High Commissioner for Refugees frequently has emphasized the difficulty in properly adducing information relating to this well-founded fear of persecution. Chapter 4 of a UNHCR eligibility guide adopted 19 years ago describes this problem in the following terms:

A refugee often tells his story in non-political terms. Some refugees are politically inarticulate in the sense of not being able to express their political views though they may have very definite opinions for which they have had to suffer. Others do not wish to discuss politics because they have had too much of it and prefer not to be personally involved. There are also some who are afraid to say what they think. In such latter cases their silence may well be the result of fear of persecution and it may be necessary to reveal the applicant's psychological attitudes by indirect questioning without the use of political terms or such technical expressions as "fear" and "persecution". (Eligibility Guide, UNHCR, March 1962, at 67).

In such cases refugees particularly need the advice and support of an attorney. Finally, and perhaps most importantly, the expertise of a lawyer is often vital in the preparation of the application for asylum (I-589) including the organization of affidavits and documentary evidence so that the applicant is able to articulate the basis of his fear clearly and effectively.

OUR RECOMMENDATIONS

We share the Administration's concern about the lack of control and inefficiency in our current asylum procedure. In response to these problems we suggest that several basic policies be implemented which would make the asylum process more efficient and at the same time assure adequate due process protection for asylum applicants. Specifically, we recommend that Congress: (1) maintain the definition of "refugee" as is established in the U.N. Convention and the Refugee Act of 1980; (2) limit the role of the State Department which in many cases causes unnecessary delay; (3) institute the position of Political Asylum Officer for which a comprehensive training program should be developed; (4) create a "Board for the Determination of Refugee Status" and (5) retain section 243(h) of the Act as a safety net for those who would suffer persecution if deported.

THE REFUGEE DEFINITION

In reaction to the recent mass influx and nationwide concern about the number of refugees flooding to the U.S., it is too easy to lose sight of the context in which asylum decisions should be made. This context is rooted in the universal and non-discriminatory definition of "refugee" that adopts the language of the United Nations Convention and has been incorporated in the Refugee Act of 1980. This definition was specifically endorsed by the Select Commission on Immigration and Refugee Policy which concluded:

By emphasizing persecution and the fear of persecution without regard to national origins, the Refugee Act establishes criteria based on special humanitarian concerns. The Act thus provides needed flexibility in defining refugee status in accordance with a universal standard that is not bound by specific ideological or geographic criteria which were used in earlier definitions. (U.S. Immigration Policy and the National Interest, at 158).

We support this conclusion and propose that the existing definition be maintained.

THE ROLE OF THE STATE DEPARTMENT

An important source in determining refugee status is the State Department's advisory opinion; unfortunately, with the great number of applications and the subsequent backlog of paper work this mandatory consultation is a major cause of delay.

The State Department's current role was established in the June 2, 1980 Interim INS Regulations (8 CFR, Section 206.7). The regulations provide that the District Director must seek an advisory opinion from the State Department's Bureau of Human Rights and Humanitarian Affairs in all cases. We agree that the opinion of the BHRHA is often vital to a well-considered decision. An applicant's background cannot be assessed without a current understanding of the political and social situation in his or her native country. Although the State Department's views may be colored by foreign policy considerations, it is currently the only government agency charged with the responsibility of gathering and analyzing this necessary information. However, it has been made clear that, given problems of manpower and budgetary constraints, the BHRHA cannot consider every application for asylum in this country. We therefore suggest that the State Department only be consulted and asked to advise INS in those cases where the District Office has doubts or factual questions.

ASYLUM OFFICERS

Other necessary improvements are called for. To ensure that applicants receive the sympathetic assistance necessary to a fair resolution of their claims, asylum cases should be separated out from routine immigration cases and handled by specially trained officials. The practice of considering asylum cases under routine immigration procedures ignores the unique and often complex nature of these cases. In so

doing, it often jeopardizes the rights of aliens to present effectively their claims for asylum.

We, therefore, agree with the Administration's proposal to appoint Asylum Officers. However, the establishment of such an officer should not preclude the entire appeals process. In her testimony before the Subcommittee on Immigration and Refugee Policy, Doris M. Meissner, Acting Commissioner for the Immigration and Naturalization Service, stated that: "Decisions by the asylum officer would be administratively final with a discretionary certification to the Commissioner or the Attorney General only in unusual cases." Thus, the admission decisions rest entirely on the newly appointed asylum officers; he or she encompasses the role of the State Department and, in out-of-status cases, the role of the Board of Immigration Appeals and the U.S. Court of Appeals. Such a drastic reduction in the applicant's hearing puts far too much responsibility on one officer and furthermore jeopardizes basic notions of fundamental fairness and administrative due process that are central to our system of justice. In the interests of achieving independence and expertise consistent with the importance of refugee matters, we would in any event place the corps of asylum officers under the direction and subject to the review of a Board for the Determination of Refugee Status whose broader functions we would also touch upon.

BOARD FOR THE DETERMINATION OF REFUGEE STATUS

We recommend that a board be established for the review of certain individual asylum applications and to address the broader questions concerning refugee policy. The proposed board (which was suggested by the office of UNHCR in the spring of 1980), would be composed of seven experts: three members of the Executive Branch, including a representative of the State Department (representing BHRHA, the Office of the Refugee Coordinator, Office of the Legal Advisor and Bureau of Consular Affairs), an official from the Department of Justice (representing INS)

and perhaps a representative of the Executive Offices of the White House. The board would also include three public members from voluntary or church related agencies that participate in the resettlement process, from other charitable, civic, labor or business groups and perhaps from a non-governmental human rights organization. The seventh member of the board would be from the Office of the UNHCR. It should be emphasized that such a board would clearly be a means of employing existing resources without creating more bureaucracy or appointing new authorities.

The entire seven member board would meet regularly to examine overall United States refugee and asylum policy concentrating on the following areas:

1. Development and clarification of refugee and asylum standards and procedures. As discussed earlier in the initial period following the passage of the Refugee Act, a number of problems and questions have arisen concerning the standards for determining refugee status, and in developing procedures to make and carry out these determinations. A number of the areas mentioned in this report will require careful and ongoing discussion and study. While the Select Commission has made a significant initial contribution to that process, ongoing review is critical. The mandate of the review board can and should include these functions.

In this context, the board would consider, for example, the criteria for selecting refugees and help to interpret concepts such as "special humanitarian concern" and "national interest."

2. Overview of the implementation of the Refugee Act. For similar reasons, it is essential that ongoing review of the implementation of the Refugee Act be incorporated into the work of the review board. Issues such as the processing of refugees by consular officers overseas should be monitored by the board at regular intervals. INS processing of asylum

applications would be reviewed periodically. The board would also make recommendations concerning the training of INS personnel and consular officials, and examine organizational structures of these agencies. It would report annually to Congress and the Executive with special recommendations for reform.

3. Review of Asylum Applications. We propose that three members of the board -- one from the Executive Branch, one from the public-interest groups, and the UNHCR representative -- be involved in reviewing those cases that are appealed from the decision of the asylum officer. In such cases the review board would act in an appellate function.

Both the review board and the State Department should have access as well to approved applications for appropriate monitoring of the system.

This outline of potential roles for the board is by no means definitive. The concept of a refugee board should be flexible in nature and its mandate broad enough to allow it to respond to changing circumstances. Most importantly, the board provides an opportunity to develop an open and ongoing evaluation of United States refugee policy, a task that can be accomplished most effectively with the cooperation and active participation of the United Nations High Commissioner for Refugees and various non-governmental organizations whose daily work makes them uniquely qualified to contribute to this process.

[From the New York Law Journal, Oct. 7, 1981]

IMMIGRATION LAW

(By Stanley Mailman)

REAGAN'S POLICY ON HAITIAN REFUGEES

President Reagan's proclamation last week directing the Coast Guard to turn back undocumented aliens on the high seas is a dramatic stroke openly aimed at the Haitian boat people.¹ Intercepting the Haitians was suggested within the highest levels of the Immigration and Naturalization Service (INS) as early as 1978.² It was also included by Attorney General Smith in his recent proposals on American immigration policy,³ and had for some time been negotiated with the Haitian government.⁴ Why then are the New York Times and other informed observers so shocked by the directive?⁵

One reason lies in the sheer brutality that Duvalier's Macoutes inflict on Haitians they fancy as foes, including those who have tried to escape. The Tonton Macoutes seem to pay little attention to the convenient labels, "economic refugee" and "illegal immigrant," that the authorities apply to the fleeing Haitians as the reason for deflecting their flight. To the Macoutes, these Haitians are simply Camoquins, or traitors.

While the administration assures that no true "political refugee" will be returned to Haiti,⁷ characterized by one State Department official as "most repressive regime in the Western Hemisphere,"⁸ our interdiction program virtually guarantees that none will escape. According to early reports of the procedure, any intercepted alien who claims asylum will be interrogated and asked for documentary proof of his claim.⁹

What purpose?

Five miles off the coast of Haiti and fearing that his claim will be reported to the authorities awaiting him ashore, who would give such further proof of being a traitor? Particularly to his American captors, there to cooperate with the Haitian government and in the presence of shipmates who might later identify him to the Macoutes, what foolhardy soul would assert such a claim? And to what purpose? There are no documents he could carry that would certify him as a refugee, and no witnesses. And no self-serving statement he would make is likely to be enough.

Of the many thousands of Haitians in the United States who have requested asylum with the help of lawyers and an elaborate legal system, only twelve succeeded, according to a State Department spokesman.¹⁰ What chance would a Haitian have, isolated on the deck of a bobbing sloop, in the stateroom of a Coast Guard cutter or at a Guantanamo hearing room, with no administrative or judicial review?

The probable answer lies in the remarkable indictment of our immigration authorities by United States District Judge James Lawrence King levelled in the eighty pages of a July 2, 1980 decision. That decision, in *Haitian Refugee Center v. Civiletti*, begins:

"This case involves thousands of black Haitian nationals, the brutality of their government, and the prejudice of ours. Perhaps thirty thousand Haitians have flocked to the shores of South Florida over the past twenty years, fleeing the most repressive government in the Americas. From among that group come the plaintiffs: five thousand persons who have sought political asylum in the United States. They claim that if they are returned to Haiti they will face persecution, imprisonment and death. All of their asylum claims were denied by the Immigration and Naturalization Service.

"For the most part, the plaintiffs reached the United States in old, small, leaky wooden sailboats. The boats are dangerously overcrowded, but these Haitians continue to brave the elements across eight hundred miles of open sea. The vast number spent weeks adrift without food or water. Many died in the attempt: When I heard the news, I went to Freeport. When I entered the morgue, I saw my wife lying there with the four children. I had nothing in my hand. It was only myself and God there. Constant Louis, Tr. at 1195-96. This case has forced the court to confront a profound set of questions: Why have so many taken such great risks? What do they flee? Why do they fear to return?

"In searching for the answer to these and other questions, the court has seen a stark picture of how these plaintiff-immigrants will be treated if they return to Haiti. And it has seen an equally stark, and even more troubling, picture of the treatment of Haitians by the Immigration and Naturalization Service."¹¹

Fruitless search

In his conclusion, Judge King adds: "Those Haitians who came to the United States seeking freedom and justice did not find it. Instead, they were confronted with an Immigration and Naturalization Service determined to deport them. The decision was made among high INS officials to expel Haitians, despite whatever claims to asylum individual Haitians, might have. A Program was set up to accomplish this goal. The Program resulted in wholesale violations of due process, and only Haitians were affected." ¹²

Judge King also made detailed findings on conditions in Haiti and on the treatment of Haitian asylum claims by our INS. He found, for example, that Haitians returned, after claiming asylum abroad, "will be greeted with great suspicion upon their arrival," that "they will most likely be viewed as opponents of the present regime," thereby incurring "a substantial danger," which for many will mean prison, beatings and torture and for some death; and that those not imprisoned "will undergo harassment, and live with the continuing threat of a midnight visit from the Macoutes." ¹³

According to the judge, the lack of an effective legal system, the unrestrained power and cruelty of Duvalier's security forces, the Macoutes, and the wide-angle definition of "political foe," makes virtually anyone in Haiti a potential target of ruthless persecution. Resisting robbery or extortion by a Macoute may very well provoke a brutal, even fatal beating. To criticize Duvalier privately, to ask after a missing politician, friend or relative, to stay home from a government-sponsored event, to fail to know the whereabouts of a "wanted" relative, can mean persecution as a Camoquin (enemy of the government). ¹⁴

Inhuman conditions

With detention and interrogation comes denial of sleep, clothing, adequate food, sanitary facilities, medical help. Torture, beatings and death from malnutrition, wounds, infection, execution often follow. From eyewitness accounts, the Judge summarized the conditions in Haitian jails as "inhuman." ¹⁵

The court also made significant findings on the handling of Haitian cases by the U.S. Immigration Service. By 1978, INS faced a backlog of some 6,000 or 7,000 Haitian asylum cases largely due to its own administrative malaise. Concluding that the asylum process, as then administered, slowed deportation it decided to change the process. How to accomplish this quickly was the focus in July and August of 1978 of a series of communications involving top Immigration officials. ¹⁶

Some of these proposed a speed-up of hearings directed solely to Haitians even at the cost of due process and contrary to the formal operations instructions. Others, on the stated premise that Haitians as a class were economic rather than political refugees, felt they should be discouraged from coming by tougher treatment, including detention at entry, denial of employment authorization, and exclusion. Another possibility noted was the interception of Haitian boatloads for handling at Guantanamo Bay. The sudden acceleration of processing was so successful that the handful of lawyers available to represent the thousands of Haitians were swamped, causing a "substantive denial of rights."

Applications prejudged

And so perfectly was this policy-message carried to every level that not a single application for asylum was granted. ¹⁷ Indeed, predetermination was so thoroughly assumed that summary reports of cases completed sometimes listed the number of asylum claims without bothering to note the dispositions. ¹⁸ No effort was made to provide the background of conditions in Haiti to the adjudicators who decided claims in the name of the district director and who issued only form-letter denials. (The district director himself only saw thirty to forty applications out of thousands). ¹⁹

By the time Judge King gave his decision setting aside the exclusion orders and requiring new hearings, the Refugee Act of March 17, 1980 ²¹ had become law. This not only expanded provisions for bringing refugees but, for the first time, gave to an alien, "physically present in the United States or at a land border or port of entry," a statutory basis for asylum which before was only a creature of regulation. ²² Section 243(h), which permitted the Attorney General to withhold deportation to a country where an alien would suffer persecution, was also amended. ²³ Limited earlier to the case of an alien who had already entered and was deportable, the provision was extended to cover any eligible alien including one in exclusion proceedings. While the amended provision disqualifies aliens who have committed certain crimes or who have persecuted others, for the alien who does qualify, withholding of deportation is mandatory; it is no longer in the discretion of the Attorney General.

Haitians, however, do not seem to have gained the benefits of the new legislation. Those who arrived at the same time as the Cuban "Freedom Flotilla" in the spring of 1980 and for a time thereafter, profited from the same treatment given the 130,000 Cubans. Neither group was processed under the asylum provisions of the Refugee Act; both, with the exception of certain known Cuban criminals, were paroled as "Cuban/Haitian entrants" pending the passage of legislation directed to their situation,²⁴ and have been allowed to remain in limbo.

New target

Meanwhile, as the influx of Cubans slowed, INS redirected its attention to stopping the Haitians, who continued to come at the rate of about 1,000 a month. Those who arrived after May 20, 1981 have been held in detention for exclusion proceedings and without the opportunity for parole.²⁵

In June, 1981 the Haitian Refugee Center and other Florida organizations began a proceeding against INS and the Attorney General on behalf of some seventy Haitians who had already been ordered excluded and deported and other Haitians detained for exclusion proceedings.²⁶ The combined habeas corpus proceeding and action for declaratory, injunctive and mandatory relief asserted various statutory and constitutional claims. These included the failure of INS to meet rule-making requirements for its policy change on the detention or parole of Haitians as of May 20, and on their being targeted for special treatment in exclusion proceedings. The petitioner-plaintiffs also complained that they were deprived of notice of their right to counsel and to apply for asylum and that they were effectively denied these benefits. A final allegation stated that defendants discriminated against the Haitians on the basis of race and national origin by subjecting them to standards not applied to other refugee groups.

On Aug. 10, after extensive depositions, United States District Judge Hastings granted the defendants' own motion to vacate the exclusion orders. The action continues however on behalf of these and other Haitians in the large class facing exclusion hearings.²⁷

Many of these Haitians have now been transferred, over their protests, from the inadequate Krome detention center in Miami to various prisons throughout the country, including facilities in Lake Placid, Puerto Rico, West Virginia and Texas.²⁸ The Service scheduled hearings at these detention centers even though they are plainly inaccessible to witnesses and to lawyers equipped to handle their cases.

Venue change denied

On behalf of the forty held at Lake Placid, a motion was made to change the venue of their hearings to Miami, New York City or another urban center and was vigorously resisted.²⁹ Taking affidavits on behalf of the Haitians and briefs from both sides, the presiding immigration judge on Sept. 9 denied the motion. Relying on the unsworn assertion by the government that it could provide no other detention facilities, he found that a change of venue would therefore impinge on the district director's power to detain, a power he held to be paramount to the right of the Haitians to counsel. The immigration judge's order has been appealed to the Board of Immigration Appeals. There is, meanwhile, a stay against exclusion hearings in the cases of Haitians who remain unrepresented.

It is clear that detention of these Haitians has nothing to do with assuring their appearance at hearings or protecting our citizenry from public menace. Efforts of the Lutheran Council, Church World Service and Catholic Charities to obtain the releases of designated groups of Haitians have been uniformly unsuccessful, even with undertakings to provide for their welfare and to cooperate in assuring their attendance at hearings. INS has not attempted to rationalize its position.

The apparent reason for the costly detention policy, now and as it was formulated in 1978, is to discourage those detained from pursuing asylum applications and to deter other Haitians from seeking refuge in the United States. One object of the depositions being taken in the Florida case is to show that the current policy toward Haitians, as in 1978, is to single them out for tough treatment. A critical aspect of that policy is the certainty of detention.

Right to Detain

The statutory right of the Immigration Service to detain was upheld by the Supreme Court in 1953 in *Shaughnessy v. Mezei*.³⁰ Much criticized then, *Mezei* was distinguished this summer in a Tenth Circuit decision holding that detention can only be used as a means to accomplish the exclusion.³¹ It refused to permit indefinite detention after efforts to deport the alien to Cuba proved futile. The Court also pointed to the long-standing policy of the Immigration Service of detaining only

against security risks or to insure appearance, a policy referred to by Justice Clarke in *Ma v. Barber*.³²

In June, a federal judge went even further in requiring the release of a Cuban, still in exclusion proceedings, who was detained by the Service on the disproved assumption that he was a drug trafficker.³³ Undoubtedly these decisions will be weighed in considering whether a detention policy, aimed solely at Haitians, can be sustained.

Even tougher legal questions would be presented in any judicial challenge to the interdiction policy announced last week. The most recent effort in the government's ongoing campaign to stop the exodus from Haiti, it may also be the least vulnerable on strictly legal grounds.³⁴ There are strong policy reasons however which strain against the stern posture of interdiction. As the New York Times stated in its recent editorial: "So it's not at all hard to understand why President Reagan wants to curtail the flow from Haiti. What's hard to understand is why he's going about it in a way that is at once so cruel, so inconsistent and so open to ridicule."³⁵

FOOTNOTES

(1) Proclamation 4865, Sept. 29, 1981, entitled High Seas Interdiction of Illegal Aliens, appears at 46 F.R. 48,207 (Oct. 1, 1981). The accompanying Executive Order 12324, Sept. 29, 1981. Interdiction of Illegal Aliens, appears at 46 F.R. 48,109 (Oct. 1, 1981). See also, Reagan Orders Refugees Halted, N.Y. Times, Sept. 30, 1981, at A1, col. 2; [N.Y.] Daily News, at 2, col. 1: U.S. and Haiti Plan To End Flow, N.Y. Times, Oct. 1, 1981, at A4, col. 2.

(2) Cf. Aug. 28, 1978, suggestion of Deputy Commissioner, Mario Noto, that boatloads of Haitians be intercepted and taken to Guantanamo Bay, in memorandum to Leonel J. Castillo, noted in Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 at 515 (S.D. Fla. 1980) with report in N.Y. Times Oct. 1, 1981, at A4, col. 2, that intercepted Haitian refugees will be taken to Guantanamo for further questioning.

(3) Testimony before Joint Hearing of Senate Subcomm. on Immig. and Refugee Policy and House Subcomm. on Immig., Refugees and Int. Law, July 30, 1980; prepared remarks by the Attorney General for a luncheon meeting of the Houston Chamber of Commerce, Aug. 3, 1981. Sheraton-Houston Hotel. There is also a section-by-section analysis of legislation authorizing the President to declare an "immigration emergency" to respond to the mass migration of visalless aliens, dated July 15, 1981, a copy of which is in this writer's files.

(4) Florida Governor Visits Haiti, N.Y. Times, Sept. 30, 1981, at A1, col. 2; U.S. and Haiti Plan to End Flow, supra note 1. In his discussions with colleagues on Sept. 3, 1981 upon his return from a trip to Haiti, Michael Hooper, a lawyer on the staff of the Lawyer's Committee for Human Rights, reported a statement of the Haitian Minister of the Interior that the agreement had already been concluded.

(5) See N.Y. Times editorial, Scant Justice on Little Boats, Oct. 1, 1981, editorial page; Refugee Aids Criticize Pact, N.Y. Times, at A4, col. 5, Oct. 1, 1981.

(6) Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 at 477 (S.D. Fla. 1980).

(7) Executive 12314, supra note 1; Reagan Orders Refugees Halted, supra note 1.

(8) Haitian Refugee Center v. Civiletti, supra note 2 at 475.

(9) Reagan Orders Refugees Halted, supra note 1.

(10) U.S. and Haiti Plan to End Flow, supra note 1.

(11) Haitian Refugee Center v. Civiletti, supra note 2 at 450.

(12) Id. at 532.

(13) Id. at 482.

(14) Id. at 476-510, passim.

(15) Id. at 494 and 493-496 passim.

(16) Id. at 511-518.

(17) Id. at 450.

(18) Id. at 510-511.

(19) Id. at 527.

(20) Id. at 532.

(21) Pub L No 96-212, 94 Stat 102 (1980). See also, S. Mailman, Refugee Act of 1980 Becoming Obsolete? NYLJ, July 2, 1980, at 1, col. 1; Refugee Act of 1980, NYLJ, July 3, 1980.

(22) 39 F.R. 41,832 (Dec. 3, 1974) amended 40 F.R. 3408, Jan. 22, 1975, establishing 8 CFR 108.

(23) 8 USC 1253(h). See also supra note 21.

(24) See S. Mailman, The Cuban/Haitian Bill and Its "Sleepers," NYLJ, Oct. 2, 1980, at 1, col. 1.

(25) Marie Lucie Jean et al. v. Meissner, U.S. Dist. Ct., S.D. Fla. Case No. 81-1260-CIV-ALH. Amended Petition for Writ of Habeas Corpus, complaint, para. 1.

(26) Marie Lucie Jean et al. v. Meissner, id.

(27) Id.

(28) Reagan Orders Refugees Halted, supra note 1.

(29) In the Matter of Alphonse, A26-006-595. et al., In exclusion proceedings, before Hon. Gordon W. Sacks.

(30) 345 US 206.

(31) Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, at 1388 (July 9, 1981). Citations to some of the criticism of Mezel also appear id. at 1388.

(32) 357 US 185, 190 (1958).

(33) *Sorosa-Gonzales v. Civiletti*, 515 F. Supp 1049 (N.D. Ga. ATL-DIV, May 21, 1981, suppl. order June 4, 1981).

(34) At the threshold it may be difficult to establish the standing of a party on behalf of an alien who is not in the United States in respect of the asylum provision which contemplate an alien who is "physically present in the United States or at a land border or port of entry . . ." INA 208(a), 8 USC 1158(a). See also INA 212(f) and 215(a)(1), 8 USC 1182(f) and 1185(a)(1), and articles 5 and 6 of the Convention on the High Seas of 1958 (U.S. TIAS 5200; 13 UST 2312), cited in Executive Order 12324, *supra* note 1. Cf., statement of Charles Gordon, Esquire, former General Counsel of the U.S. Immigration and Naturalization Service, questioning the authority of the President's executive order and his doubt "that the arrival of 1,000 oppressed and impoverished Haitians each month presents the type of national emergency that would justify such an extreme measure." *Seattle Post-Intelligencer*, Oct. 2, 1981, at C2, col. 4.

(35) *Scant Justice on Little Boats*, *supra* note 5.

Senator SIMPSON. Well, you have each given us very important information to process. As I said, I have an affinity for the members of the bar because I think the bar is always going to be very much a part of any changes, especially the type of sweeping changes that are going to take place in this area.

Whether they are done now or whether they are done later, they are coming. They will become more intense and more critical, and that is not dramatic. I try to stay away from the highly dramatic horror stories in my chairmanship of the subcommittee because it does nothing to add to the dimensions of the debate. So, I do not linger in that area.

I would just say, it has all entered a new arena now and that is called Congress. Congressmen do not spend much time reading white papers and decisions, and legal opinions of the third circuit, West Publishing, court reports, I know that they do not.

They do one thing, though, they read their mail. In some of their mail they get interesting comments like, "What are you boobs going to do about this issue?"

It will do no good to do what we have always done with immigration and refugee policy, to put in some new piece of law on the books which has vestiges of racism and odds and ends as in the past. So, I look toward the bar and it is important, therefore, to hear what you have to say.

I would add this in the midst of various comments and hearing those from all of you, to clearly state that the interdiction process of the Government today under this new proposal is an interdiction only of a vessel flying a U.S. flag, no flag, or a flag of an agreement country. I think it is important to pull that back into the perspective, or we get to thinking about the Soviets and those kinds of things. I just hope we can stay with that.

Then, references to "shooting at the border" and what that may be leading us. I do not think that is very helpful, at least it is not to me.

There have been references to Nazi Germany. Those things are not helpful in this debate.

What is helpful is to know from four gentlemen who are very deeply involved, how we are going to do something that, at the present time with the clear knowledge at least by this Congress, that we cannot solve all of the internal domestic problems of Haiti, and El Salvador, and other potential sending countries.

Then the question is, new migrants will continue to come, claiming asylum. What will you propose to us as an efficient, practical, fair asylum procedure—leaving out those other things which will

not be corrected by this Congress in the foreseeable future because they have never been corrected in the past ever.

So, without going into foreign policy and Third World proposals, where do we go from there, and how do we make our way of life more attractive to them, or what systems of support do we offer?

But what are we going to use now without these other things as we have a backlog of 95,000, and what we perceive to be 50,000 perhaps next year?

You are as interested in that as the rest of the American citizens. You are skilled. You have seen your position upheld by the judicial system throughout the country. But now we are here. Where are we right now?

DUPLICATION V. ERROR CORRECTION

Mr. KURZBAN. There is no question that the process as it exists now is a duplicative process, it really does not help anyone. It does not help the Immigration Service in processing the cases and it does not help the aliens because no matter how many different systems you put them through before the immigration judge, to the Department of State, to the District Director, nothing is added to the process in the way of protection. It is our position, certainly, that the processes that are duplicative should be eliminated.

But on the other side of that is that you have to have something that is going to insure that in those cases where aliens have bona fide claims to asylum, that they are not just swept up in the process. That is exactly what happened in the lawsuits that we have mentioned previously.

I think the only way to do that is to create some independence in the system, that is, take it out of the function of the Immigration Service in the sense that the Service's desire is to move cases quickly because that is their chief goal.

Their goal is not really to reward people for insuring that they perform consistent with legal norms. Their goal is to rush people through the system. So, in some sense create some independence in the system.

BURDEN AND STANDARD OF PROOF

Second, change the standard and burden of proof as it exists presently. The present system requires that an alien show a "clear probability" that he is a bona fide asylum applicant.

That standard, determined by the Board of Immigration Appeals, effectively rules out anyone actually meeting the standard. What then happens is, that the decision is left to the judgments of the immigration judge as to what he feels are the political conditions in a particular country; an alien that comes to this country does not have the resources; does not have the language skills; does not have the background; and does not have the materials available to prove his claim.

To burden him with additional problems by making him prove the highest possible standard of proof makes it impossible to effectively make an asylum claim.

On the one hand, I am in perfect agreement with the position that says, eliminate all these duplicative processes, they do not

help. They do not help the alien and they do not help anyone else. But you have to have some way of correcting the error that may accrue as a result of sweeping people through this process.

INDEPENDENT ASYLUM PROCESS

It seems to me, the way to do this is to set up an independent asylum board that has immigration judges specially sitting solely for the purpose of hearing asylum cases rather than making it part of the deportation process, and to change the burden and standard of proof.

The second thing—if I may just briefly—that comes to my mind in regard to this is that the problem is not at the appellate level. The remedies that have been suggested seek to eliminate all appellate processes. If you look at all the cases and you look at all the backlog, the backlog occurs at the entry level. In *Haitian Refugee Center v. Civiletti*, those 4,000 cases did not occur at the appellate level, they all occurred at the entry level."

In fact, the government's argument in those cases was that, "Do not worry about this because there is a way to correct any error at the appellate level."

So, I do not think that eliminating all rights of review is going to eliminate the problem that you wish to address which is, how do we deal with these 65,000, or 95,000 people who are at the entry level. Doing away with the appeal process is not going to change that fact at all.

Senator SIMPSON. Mr. Swartz, I would be interested in your response to that. I hear you clearly, I really do, about what you are saying about the philosophical aspects. Where are we and where do we go?

Mr. SWARTZ. Let me address two things, the interdiction in practical terms and my summary, my specific suggestions.

I think the consequences of interdiction, if we are realistic about what the facts are, it is not going to significantly curb the flow. We may see some of that over the next several months, but I would attribute that to the weather rather than the fact of the Coast Guard cutter. It may divert the flow to some extent to the Bahamas or other countries, raising other issues.

I just do not think it is practical, putting all ethics and history to the side; I do not think it is practical.

Second, on detention as a specific new policy that has been adopted, I am concerned that if one believes Haitians will continue to come, and the Salvadorians. If they know that they are going to be detained and imprisoned if they get caught, they have greater incentives to enter up the coast line to avoid being apprehended upon arrival; and once they are here, to remain undercover.

I think that may well end up compounding the problems of local communities. INS itself says that they believe they apprehend no more than 50 percent of those who actually arrive. So, it is a practical consideration with regard to detention as a policy, with regard to processing people who do arrive and seek asylum.

I do think some thought ought to be given to international models, how this is done in other parts of the world, that the international community is financing, is that much more participating

in resettlement opportunity for bona fide refugees; the international community is involved in repatriation, so it is not the United States alone responding.

If we acknowledge that this is not simply an illegal migration phenomenon and there are some people who may well face persecution upon return, that it is somewhat different from the Mexican flow, then we may be well advised to take a hard look at this international model.

Now, whether the U.N. does it, or the OAS process I set forth at pages 9 and 10—which I will not repeat—several principles or criteria that I think ought to guide our specific responses.

And in terms of streamlining I would generally concur with some of the points already made, that if it is done fairly and lawfully, applied the way Congress intends to have it applied, you can have an asylum officer—whether an INS agent or a separate agency that is set up, an advisory board—I would give the advisory board the function of devising group profiles for asylum.

There are 12 categories of people we generally know leave a place like Haiti or El Salvador, and persons with these kinds of individual characteristics we think may well have a well-founded fear of persecution; if they do not have those characteristics, then we do not.

By having an advisory board develop some profiles, and again assuming that it is done honestly and fairly, it could streamline the process considerably. The individual applicant would then have to prove only that he falls within the profile rather than 70 pages on documents on general conditions at Haiti.

The asylum officer's job would be to make the judgment about whether the person fits within the profile, and he would look to this advisory board—which I would recommend be comprised not only of U.S. Government representatives but international organizations, nongovernmental organizations to give more credibilities—a perception of fairness as well, as I think, probably reality of fairness.

Then a one-step appeal. I think we have to preserve the right to appeal. I do not think it necessarily has to be six layers, but I think there has to be an independent judiciary to see that the law is applied honestly to the facts, and that the facts have been honestly developed.

Finally, I do think there are some practical reasons to not eliminate the jurisdiction of the district courts. In the Haitian refugee case we might have been looking at 4,000 individual appeals had there been money, basically, to finance those 4,000 appeals, which would represent a tremendous cost, administrative cost; tremendous time delays.

Sometimes the courts can be much more efficient than the administrative process. You have a class action challenging a pattern and the courts say you did not do it right the first time, you do those 4,000 cases over. That may well be better and more efficient than having 4,000 appeals.

Senator SIMPSON. As you talk about the group profile or group assumption? Of course that comes back to the issue of having done it individually in the past. Would that not open the charge more

than now of discrimination on the basis of race and national origin?

Mr. SWARTZ. I think it is a very fair danger to be concerned about. What I have in mind would not be group decisions so much but rather profiles. It would still be an individual determination, but the character of that individual determination would be substantively somewhat different and perhaps cleaner and more quickly accomplished.

Senator SIMPSON. Senator Grassley?

Senator GRASSLEY. I have no questions.

Senator SIMPSON. I have a few more.

I think it was your comment, Mr. Kurzban, or one of you, about the burden of proof, suggesting changing the burden of proof because the applicant has such a heavy burden to carry—that certainly may or may not be so. You are saying that it is so.

You suggested to us in the reform and revision of these laws that we change the burden of proof so that the Government will have the burden of proof of showing that there is no well-founded fear of persecution because of race, religion, political opinion, or that the refugee has the presumption. Which is it, of those?

Mr. KURZBAN. No, neither of those, Senator. What I was suggesting is maybe something similar to what we have in title VII cases, in employment discrimination cases, age discrimination cases, where the alien has to come forward and prove at least a prima facie case—that he is a prima facie and bona fide asylum applicant—and to present something to indicate that.

The burden would then shift to the Government to disprove that, but ultimately the burden would still rest upon the alien to prove his claim. Very similar to what we have in other areas of the law because if we recognize that people, in our own country, who have skills and at least have some understanding of the process, may have difficulty proving their claims. One of the things that has been made clear in all these cases that we have litigated in south Florida is that the people we represent generally have no understanding of the process. The process has to be intelligible to them, and it is not now.

At least they should have some kind of weighted burden—I am not saying to eliminate that, but at least give them an opportunity to come forward and prove a prima facie case.

Senator SIMPSON. I was particularly interested, Mr. Dale Schwartz, I understand you are not ordinarily connected with this type of immigration litigation.

Mr. SCHWARTZ. Mr. Chairman, that is not exactly accurate. I practice corporate and international law, but for the last 12 or 13 years I have engaged extensively in the practice of immigration law, much more so in perhaps the last 4 or 5 years. I have handled several thousand immigration cases over the years.

I would like to also, if I might, apologize to the chair for the analogy to the use of some hostile nation's vessel to transport people toward the shores of the United States. I realize quite well that the Presidential proclamation does limit the types of vessels which we would attempt to interdict at sea.

But from what I have read in the media what the administration's proposal might well be is that they be given the authority by

this Congress to intercept any vessel—whether it bear the U.S. flag or a flag of some nation with which we have entered into a bilateral agreement. I just wish to point out the danger of that kind of request.

Senator SIMPSON. There is a danger, too, in believing everything you read in the media. [Laughter.]

Mr. SCHWARTZ. Touché.

Senator SIMPSON. We cannot live with them, and we cannot live without them, that is the way it works.

Mr. SCHWARTZ. Senator, there has been some discussion and some sentiment, I think, among some members of this committee and other Members of the Senate that perhaps we should get the State Department out of this asylum processing role altogether.

I have agonized over that a good bit. You know, with every program, as you pointed out, there is some good and there is some bad. Quite often the State Department makes a very intelligent determination in a case. I think there are a number of conscientious people there who attempt to do that.

However, when you get the situation as we have seen recently where only about 2 months ago some rather high officials in the State Department publicly announced that they had not yet begun to even examine on an individual basis some 9,000 Iranian asylum claims that were stacked up in boxes in a warehouse somewhere or a room somewhere, and suddenly within the last few weeks literally thousands of decisions on those claims have come out from a staff that is, I think, three or four people in that department, you begin to wonder how careful the examination of each of those claims is, Senator.

I would think that the State Department's role in the process is a good one. I would agree that they are understaffed and underfunded and unable to handle a large influx of cases that suddenly descend upon them. I do not think, though, that we should get them totally out of the process.

I am concerned, however, from the tremendous amount of personal experience in this area, that once the State Department enters an advisory opinion in an asylum claim that at that point the Immigration Service pretty much rubber-stamps that decision.

In other words, if the advisory opinion is to grant asylum, the Immigration Service feels that they have been "let off the hook" so to speak and they will, I am sure, in 99,000 out of 100,000 cases go ahead and grant the political asylum.

If the State Department recommends denial of the asylum claim, normally that terminates as a practical matter, from the experience we have had in dealing with the actual adjudicating officers around the country, that terminates the inquiry until the person goes again before an immigration judge.

So, I am not sure that I would take the State Department out of the system, but I think I would somehow give less emphasis perhaps. It would be one additional tool or fact-finding process that could be used by an honest-to-goodness adjudicating officer who would hear all the facts.

Senator SIMPSON. Let me ask you because, although others have been more intensely involved, and you have been successfully involved in it, certainly, in connection with the Cuban entrants.

What I want to develop is to see what we can do with legislation, that is what we are up to in this hearing process. As you know, none of these hearings are directed to a specific bill, but they are all directed toward putting something together from the vast resources of the Select Commission, Senator Huddleston's legislation, the temporary worker legislation—there are several of those—all those things.

Then we will actually have our own presented, which will be an interesting type of effort, to see if we can make the Immigration and Nationality Act read in English.

Mr. SCHWARTZ. We lawyers would appreciate that as well, Mr. Chairman.

Senator SIMPSON. Oh, really? [Laughter.]

Let me ask you, what were the major differences that you saw in litigation in this area and experience with litigation in the other areas, and what changes may be justified?

Mr. SCHWARTZ. Let me say this, that like the chairman of this committee and many of the members of the committee, I have practiced before a number of State and Federal agencies in the United States—I have lost track of the myriad of alphabet acronyms for those agencies.

But I have never been so frustrated in 14 or 15 years of practice as I am when I must appear regularly before the Immigration and Naturalization Service. It is not necessarily because of the attitude of the service, but it is because of the fact that I believe that the Congress many years ago abandoned the Immigration Service as far as their needs are concerned—budgetary needs, computer needs, staffing needs.

It is so far behind it cannot help but break someone's heart, Mr. Chairman, to see it take 3 to 5 years for a simple kind of a petition in certain super-busy offices of the Immigration Service to get adjudicated relatively simple kinds of cases. We have all heard the horror stories of lost files in warehouses that have disappeared.

But if that agency had the staff, and if they had the people power, if you will, to adjudicate these claims and cases, I think things would work much more swiftly. As the last Commissioner of the Service said, "Just give me typewriters. If you will not give me anything else, give me typewriters." It was almost as if it was a voice crying out in the dark for help.

Those of us who deal with them on a day-to-day level cannot help but be frustrated with the delays, the lost files, and the apparent lack of concern on the part of even the public for speeding up the procedure and making it more equitable for everyone.

I am not sure that we need substantive and major changes in the way that we handle asylum claims. There is an overriding United Nations Protocol which limits us to some extent as to what we can do.

I personally feel that giving somebody only 14 days after they enter the United States to file an asylum claim or it is lost forever, except for some new changed circumstances, would clearly violate both the spirit and the letter of that Protocol.

Not to have the right to appeal, I think, would violate both the spirit and the letter of that Protocol.

It could be seriously argued that when a person has abandoned their residence in some other country and sailed for the United States or some other jurisdiction, that they really at that point have nowhere to return to. The mere fact that we do not let them come forward to make a fair and adequate kind of asylum claim in and of itself violates the U.N. protocol.

I think that those issues would be hotly litigated and there are serious constitutional and international law principles involved. I am not certain that we need major changes. I think we need more staff and we need more consideration given to the procedures that we have on the books today.

Senator SIMPSON. I guess you hit upon what my gravest concern is. I think all of this will be hotly litigated. And meanwhile, while we are hotly litigating we are getting more and more of a burden on our system in the United States of America. That is what I am interested in.

I used to "hotly litigate" myself, and I loved it.

Mr. SCHWARTZ. I might add, Senator, though that to the best of my knowledge the clients of the lawyers sitting at this table on the issues of asylum, particularly with regard to the Haitians and Cubans, are not paying counsel anything to do this litigation. We have all done this either on an appointed basis or a volunteer basis because we are seriously concerned about the rights of these people. We are not drumming up litigation, so to speak.

But I would agree with the chairman that if new statutes were enacted it would give rise, as it always does, to some series of litigation to interpret those statutes.

Senator SIMPSON. I am aware of that.

Let me ask you, since you have this pro bono work, let us get that on the record because it is important.

We received correspondence, especially commentary from people in Florida who say—I do not go there anymore. I have made myself available of that area in the United States and it gets pretty hot—but we may come to a field hearing. We have pictures and affidavits, and information on people who are just hanging out a shingle and saying, "Here is how you stay in the United States, drop in here and pay your \$400," like what we have in our profession that hurts us all, the ambulance chaser. I guess in that area they are refugee chasers, and those who seem to be jealously guarding onto themselves the novel and arcane, using language of the Immigration and Nationality Act, who raise delay to an art form.

Now, as you perceive it, how common is that?

SOLICITATION IN REGARD TO HAITIAN REFUGEES

Mr. KURZBAN. Senator, if I may respond to this because I probably receive as much mail as you do, being in Florida, about that.

I think there are three different issues that you have really addressed. One is what we would call the unauthorized practice of law, and that is certainly something that the Association of Immigration and Nationality Lawyers—and I was the past president of that this past year—take very seriously.

We have certainly made efforts to bring to the attention of the Florida Supreme Court and other authorities as to people who hold

themselves out as notaries and claim that they are authorized to practice law when they are not.

The second issue is the issue of solicitation. I have a certain amount of sensitivity to this issue because this is something that the Immigration Service has accused the lawyers—when I say accused I mean that—who have been representing the Haitians in Florida for several years, of soliciting clients.

This has been a dispute with the Service and is now part of litigation in one case presently in the southern district of Florida, and was part of the litigation in *Haitian Refugee Center v. Civiletti*.

None of the attorneys accept any fees from any of the Haitians for representing them. That is, none of the attorneys who work for the Haitian Refugee Center, Inc., Legal Services, or any other organization providing indigents free legal services.

It has been our position and will continue to be our position, as we believe it is the position of the Supreme Court, *In Re Primus*, that an attorney who is not seeking any fee from a client has the perfect right to go and, if you will, solicit that client. He has a perfect right to talk to that person to explain to them what their legal rights are. If they do not have counsel, if they cannot afford counsel—which are always the questions that are first asked—because the last thing we want to do is to represent more people than we are now.

But the fact is that many of these people are indigent. If they do not have counsel and cannot afford counsel, then we represent them.

We feel very, very strongly about this issue because we believe that the Immigration Service has used it as a wedge to separate aliens, and principally Haitians, from lawyers who were able and willing to represent them at no cost.

Mr. Crosland sent me a letter when I was representing Haitians on an individual basis. There have now been personal attacks by immigration judges and by members of the central office of the Immigration Service against other attorneys. And by the way, these attorneys to the degree that they are getting paid by the Haitian Refugee Center, Inc., for example, as opposed to any individual Haitian, are doing it at a salary far less than they could make if they went out and practiced law on their own.

So, they are doing this at great personal hardship to themselves. They are now doing it at the cost of being accused of soliciting, as the chief immigration judge, now the Immigration Service, accused, one of the attorneys of doing in the New York Times, several months ago. That may lead to litigation itself.

The third thing is the issue of delay. This is an issue, of course, that is greatly troubling people in south Florida, and this was the issue that I was trying to address initially.

The Immigration Service has a goal, which is to expedite the departure and expedite the processing of people as fast as possible. To some degree that is a legitimate goal as long as it protects people who have bona fide claims.

In each one of the lawsuits that we have brought we have not tried to develop new rights of refugees. We have not tried to say, for example, that people in exclusion may have constitutional rights when they do not.

What we have tried to do is to get the Immigration Service to follow their own regulations, and they have consistently failed to do that. So, to the degree that there has been delay, there has been delay because the Immigration Service has failed to follow their own regulations.

There has also been delay, particularly in the Haitian litigation in south Florida because the Service has not acted. For example, between November 1977 and May 1978, the Immigration Service—although they could have processed thousands of deportation cases—just sat on them.

What ultimately led to the *Haitian Refugee Center v. Civiletti* case is, somebody in the central office after waiting about 9 or 10 months said, "Hey, we have this problem, just move these cases." Instead of doing them in an orderly, systematic basis over a long period of time, they waited. All the cases were bunched up, and then they sought to move them.

It is our contention and has been, and I believe Judge King found in the *Haitian Refugee Center v. Civiletti* case, that it was the Government's own inaction for a substantial period of time that resulted in the delay.

Mr. MAILMAN. Senator, may I supplement that just briefly?

Senator SIMPSON. Yes, Mr. Mailman.

Mr. MAILMAN. You may be aware that a very large number of the people who had been detained at the Krome Center for a long time have been shipped to various detention centers—I should say prisons, Federal prisons—in various parts of the country.

Without being able to say of my own knowledge that it was the intention of the Immigration Service in doing so to separate them from counsel, that has certainly been an important byproduct of that effort of the Immigration Service, because, in many of the places where these people have been sent, there are just no counsel experienced in immigration matters who are available to give assistance, legal assistance, to these people.

So, in one of these areas, Lake Placid in upstate New York, where they are, nobody has attacked me for it, but I volunteered to make a motion for them to move the venue of their cases back to Florida, or New York, or some other urban center where lawyers are available.

Now, the Immigration Service has, as Mr. Kurzban has said—and he is very experienced on the factual side of this as well as the legal side—has been terribly inefficient in the processing of not only this type of case, but many other types of cases.

I say "inefficient"—it may very well be, as you know, that they lack the resources to do so. But there has now been, I think, a loss of confidence in the Immigration Service, in its ability to do an efficient job in the handling of cases.

Particularly since this committee has such a concern, and rightfully so, with an efficient and fair handling of such cases, the lawyers committee on whose behalf I am speaking today has suggested the establishment of a board for the determination of refugee status, and for asylum officers who would be responsible to that board.

Now, three of the themes that I think have come out, at least in this portion of the hearing, are the inability of the Immigration

Service to cope with these matters effectively and fairly; the lack of independence, if you will, of the Immigration Service adjudicators in doing so; and, in a sense, a kind of politicization of some of these issues.

It is unfortunate in a way that the State Department has such a heavy responsibility because the State Department is also charged with the carrying out of our foreign policy. And there has been a very sharp difference between the handling of Cuban cases, on the one hand, and Haitian cases on the other hand. I think many people believe, and rightly so, that there are basic political differences, international political differences, for that.

Now, if that could be taken out, at least that aspect reduced in the function of adjudicating these cases, I think it would be all to the better. I think that an independent board for the determination of refugee status would be in a better position to do so.

Senator SIMPSON. I thank you very much for your testimony. I remember when I came into this task as chairman of the subcommittee in January, I asked the Attorney General if asylum claims were being processed in an orderly basis, for no other reason than just to find out how that might work, and if not, that we develop new procedures that will work.

Of course, the INS, there is not a thing you could tell me, it is an Agency absolutely in tatters. It does not function. It has not even had a Commissioner for 3 years, you know that as well as I. There was no way the Congress was going to give them more money when they could not do anything with what they had.

Now, we have a Commissioner, there is a crackdown by the administration, perhaps a reorganization. We have all read the Kratzky proposal, there are some interesting things in there. We will try to work some of that into the legislative process, too. Mr. Kratzky is out on the road now. He has some interesting proposals. I hope you will look at that study and share with us your views on what he is proposing.

Then, you know, it is important to tell that story about your participation and the reasons for it because there is another theme that would pull it down to crass, money grabbing—you know, "Put your money up."

I think that is very important. If the fees are being paid by the center, funded by the Legal Service, put that right out on the table, too, with the hourly rates and let the people in the country see what is involved in it. We have already found people wanting to hold hearings just on that issue alone.

Mr. KURZBAN. Senator, if I may, just to clarify one thing for the record.

Senator SIMPSON. Yes.

Mr. KURZBAN. We have estimated in our office as a result of representing Haitians over the past 5 years that we have lost somewhere in attorneys' fees and time between a quarter of a million and half a million dollars.

So, any charge that we have made money on this thing is just absurd.

Senator SIMPSON. That depends on regional things, litigation things. When I practiced in Coty, Wyo. I did a lot of referral work

from lawyers in New York. They would say, "Now, send us your bill."

I would say, "No, I will just send you my hours." I loved that. [Laughter.]

That took care of me in ways more magnanimous than all my clients in Wyoming.

So, thank you very much, I really appreciate your testimony.

Mr. SCHWARTZ. We thank you, Senator, for your attention.

Senator SIMPSON. We will take about a 3- or 4-minute break and resume.

[Whereupon, a short recess was taken.]

Senator SIMPSON. Scholars of the world unite—it says "scholars panel." I guess we will just leave it as scholars panel.

I certainly welcome you to the hearing. We have Prof. John Scanlan, Center for Civil and Human Rights, Notre Dame University School of Law; Prof. David Martin, University of Virginia School of Law of Charlottesville, Va.; Prof. Richard Boswell of the National Law Center of George Washington University; and David Milhollan, chief judge, Board of Immigration Appeals.

We will proceed in that order. You are aware of the time restraints. Thank you so much, proceed.

STATEMENT OF JOHN SCANLAN, PROFESSOR, CENTER FOR CIVIL AND HUMAN RIGHTS, NOTRE DAME UNIVERSITY SCHOOL OF LAW

Mr. SCANLAN. I am going to summarize the statement that I gave to you, if that could be included in the record I would appreciate it.

Senator SIMPSON. Indeed it will, without objection

Mr. SCANLAN. I will start with some things that are pretty basic. Obviously, asylum is a legal obligation which we have incurred for humanitarian reasons. It derives from treaties and from domestic legislation. Anything that this Congress does or any Congress does, I suppose, ought to seriously consider the reasons for having asylum procedure at all in determining how they can be improved.

At its most basic, the legal obligation that we have incurred for those seeking asylum is not to return them to their country of origin when they can demonstrate fear of persecution.

The issue for this Congress is how to meet that obligation in a manner which is both fair and expeditious. The need to streamline procedures is almost as clear. I really do not have any idea how many asylum cases are pending because the testimony that has been given before this committee varies a little bit from time to time.

I noticed, on July 31—I am not sure whose testimony it was, I believe that it was probably Mr. Hiller's, he indicated there were 60,000 asylum cases pending, not including those involving 140,000 Cubans and Haitians. I do not know if that total has been dropped to 95,000, or more.

Senator SIMPSON. You are about right. I think Ms. Meissner said that it was reduced by 30,000 to 65,000 versus the 95,000 the difference is indeed the Cuban entry which in July was 50,000 or so. I am sorry to interrupt.

Mr. SCANLAN. No problem.

Beyond a doubt, part of the present problem in the asylum procedure arises because it contains unnecessary steps and encourages delay. However, I would concur with something that was said in the last panel, and that is that any attempt to improve the system must start with the recognition that asylum review has gotten out of hand in large part because initial asylum procedures are frequently perceived by the courts, who now have a role in pursuing those decisions, as being politically motivated and conducted with prejudice, and based upon predetermined advisory opinions which are too comprehensive and do not permit individual applicants to demonstrate their well-founded fear.

I think that is very self-defeating because even if in the initial determination the burden which is imposed upon an applicant is extremely strict, by the time that that applicant gets the opportunity to make his case directly or indirectly before a court of law, it is by no means clear in the resulting litigation that the people being excluded are asked to prove more than the Government.

Attempting to limit the judicial role without remedying the system of initially evaluating asylum applications may lead to greater efficiency, but it will do so only at the expense of the rights of those who by law are permitted to show the likelihood that they will be personally persecuted if repatriated—unless, of course, we remedy the initial system of review in such a way that the initial determination is effective.

Further, whatever efficiency may be gained by limiting review, if we do not remedy initial determination procedures, it is likely to be limited by several factors, including constitutional problems about the right of the Congress to completely do away with, for instance, the role of the district courts during habeas corpus petitions; the right of deportable aliens to appeal final orders of deportation to the U.S. Court of Appeals; and the continued interest which voluntary agencies, the public interest law groups, are likely to have in bringing suits against systematic denials of due process rights.

If the initial procedures do not work, then no matter what sort of appeals system we have in place, there is going to be a perception that unfairness exists. If that perception of unfairness exists, money will be found to finance law suits. If law suits are filed, we will have the continuing delay which characterizes the situation right now.

However, if initial asylum procedures are improved, then a much simpler review system than that presently employed can be instituted. As long as that system provides a means of assuring that the initial decisionmaker acts fairly and follows its own procedural rules, it need not provide for additional levels of review. I think that we then can basically get by with one level of review, assuming that the initial procedures are improved and that the reviewing agency is sufficiently independent.

ASYLUM PROFILES

First, with respect to initial determination: based on studies already done at my center and submitted to the Select Commission—which serve as a basis for my written statement—the present advi-

sory opinions ought to be replaced by profiles providing a general guideline for examining individual claims which, by the way, is what international organizations, particularly when they are reviewing mass asylum applications, generally do.

They look at the underlying conditions when large numbers of people are seeking asylum, and they basically determine whether those underlying facts would support the claim for a good number of them.

Second, that the profiles be assembled by a body other than the Department of State but receiving input from State and other information sources. I do not think State should be excluded, neither do I think they should dominate the process.

Third, that individual claims be examined with reference to those profiles, particularly to test the claimant's credibility, but with due regard to the individual nature of each claim.

Fourth, that fulltime asylum officers handle those claims.

Fifth, that such officers have sufficient education and expertise to test credibility and to determine the claims on the basis of appropriate legal standards.

ASYLUM REVIEW BODY

Any asylum review body has to serve to discipline the initial factfinder. It must be so in a judicial rather than a political manner. If such a body is established by the Attorney General, staffed haphazardly or on the basis of political considerations, and affords review only on a certification basis, then I do not believe that it can serve that disciplinary role. Mistakes that are made at the lowest level will be passed right on up.

I will finish up in a minute or two, if I could.

Senator SIMPSON. One is what I am going to give you. Just summarize.

Mr. SCANLAN. I do not think that the U.S. courts of appeal would be preferable. I think that there are problems with case load and with getting cases before the courts of appeals in a timely manner, and for a number of reasons I believe that the better solution is to establish a nonpolitical board, appointed by Congress and sitting for a specified term, having the exclusive responsibility of reviewing asylum claims.

Thank you.

[The prepared statement of Mr. Scanlan follows:]

PREPARED STATEMENT OF JOHN A. SCANLAN

Mr. Chairman, thank you for inviting me to appear before this subcommittee. I am the Assistant Director of the Center for Civil and Human Rights, an arm of the Notre Dame Law School devoted primarily to legal and public-policy research. Since February, 1980, a substantial portion of the Center's work has been devoted to analyzing United States refugee policy and those changes in the law that might make it fairer and more workable. Largely as a result of the Cuban-Haitian influx which began in April, 1980, the primary focus of that work--including most submitted to the Select Commission on Immigration and Refugee Policy--has been on problems of "mass asylum".

I have been asked to testify today about some of the alternatives which have been proposed for changing the manner of reviewing initial asylum decisions. Any discussion of these proposed changes must begin with a firm grounding of what "asylum" is, what we as a nation have committed ourselves to by treaty and through domestic legislation. Asylum is a legal obligation we have assumed for humanitarian reasons. At its most basic it is an obligation not to return to their country of origin those aliens who are in the United States or at its borders, and who can demonstrate "a well-founded fear of persecution" should they be repatriated. Certain minimal standards of "due process" guaranteed by treaty, statute, and administrative regulations insure that those claiming asylum will have the opportunity to demonstrate the basis of their fear.

Legally, the roots of this obligation lie in the language of the 1951 Convention Relating to the Status of Refugees, which the United States played a key role in drafting, but never ratified. The Convention language is binding on us, however, because of our accession in 1968 to the 1967 Protocol Relating to the Status of Refugees, and because, in 1980, we specifically adopted it in our own Refugee Act. At that time, the members of this august body and of the House of Representatives indicated an express intent to guarantee asylum applicants their Protocol rights.

See S. Rep. No. 256, 96th Cong., 1st Sess., 9 (1979); H. Rep. No. 781, 96th Cong., 2d Sess., 20 (1980).

The 1980 Refugee Act was the first systematic attempt made by Congress to address the problems posed when the United States becomes the country of "first asylum". All of us here are aware of the great national generosity that brought more than 2,000,000 Europeans, Asians, and Cubans to the United States as "displaced persons" or "refugees" to the United States from 1948 through 1979. But all of us are also aware of the "coffin ships" that were turned away from our coast in the 1930's, dooming several thousand Jews to death in Hitler's concentration camps. And we well remember, I think, that affront to the national conscience inflicted in 1970 when the Coast Guard--in an act replete with retrospective irony in this, the first month of Haitian "interdiction"--returned to the Soviet Union a Lithuanian sailor by the name of Simon Kudirka seeking political asylum. It was that incident that led to this country's first asylum regulations.

It is the grandchildren of those regulations, granted legitimacy by statute, that are at issue here today. The influx of nearly 140,000 Cubans and Haitians in 1980, along with tens of additional thousands of Iranians, Ethiopians, Nicaraguans, and Salvadorans, almost all seeking asylum, has created administrative and political problems inconceivable two years ago. It may be difficult to determine if a single Lithuanian sailor--or Romanian gymnast, or Russian ballerina--is truly motivated by fear in attempting to enter the United States, but a determination can at least be made quickly, and the delays incident to any appeal of that determination have no significant economic or social consequences. Delay in the initial processing of asylum applicants when they arrive en masse is inevitable under any administrative arrangement; yet under the present system, they are intolerably long. Tens of thousands of asylum applicants still await individual processing both at the Department of State and at the INS. Because that processing involves multiple stages of review, many

of them pro forma under current practice, it is likely that final disposition of many of these asylum cases will not occur for years. Meanwhile, communities such as Miami are inundated with thousands of applicants whose presence they can ill-afford, due process considerations give way to considerations of expediency, and detention facilities which by any fair standard must be regarded as shameful are pressed into service at remote locations like Fort Allen.

The easiest solution to these difficult problems is to proclaim the virtue of selfishness, to prove we have learned nothing from Kudirka and the coffin ships by adopting cynical legislation designed to insure that asylum is granted to virtually no one, and that the courts or administrative agencies entrusted with monitoring initial asylum decisions are deprived of their opportunity to exercise any meaningful review. Alternatively, the Congress may follow the more difficult path, and seek to balance the undoubted need to streamline existing procedures with a continuing commitment to protect the lives and safety of those facing genuine persecution. It is the latter course that I hope this Congress pursues.

Review procedures under a streamlined, yet humanitarian system should be designed to insure that the asylum applicant in his initial hearing was afforded a full and fair opportunity of making his case, and that the evidence presented by him--or on his behalf--was evaluated fairly. The chief purposes of a judicial or administrative agency of review, in other words, should be to discipline the decision-maker of first instance by providing for a reversal or rehearing of determinations which put an unjustifiably heavy burden of proof on the individual applicant, or which deprive him of elementary due process.

Here, I must emphasize that it is premature to address the issue of review at all if the body or bodies making initial asylum determinations customarily prejudge asylum claims, ignoring the evidence adduced by individual applicants, conducting hearings summarily in a manner calculated to deprive applicants of all

legal assistance, promulgating or relying upon "advisory opinions" that are based on broad political judgments, rather than on the individual situations of those seeking asylum. In the materials submitted by the Center to the Select Commission, we concluded that the present system--in which the Bureau of Human Rights and Humanitarian Affairs (B.H.R.H.A.) of the Department of State comments "individually" on each asylum application via an "advisory opinion" which is not individually composed, and which cannot be, given present B.H.R.H.A. staffing levels, and in which INS personnel customarily regard such "advisory opinions" as dispositive (as we have been told repeatedly that they do)--is by its very nature unfair. We recommended that "group profiles", generated by a less-purely political organization than the State Department, and kept on continually updated file, be substituted for the present system of advisory opinions. We recommended further that the body charged with using these profiles, which traditionally has been the INS, be trained to use them as guideposts or standards against which the credibility of individual applicants could be measured, and that such credibility, enhanced by whatever additional evidence the applicant could bring to bear, rather than the profile itself, should provide the ultimate justification for granting or denying asylum. In the year since we made those recommendations, nothing has happened to suggest that they were misguided. Instead, the backlog of applications has apparently grown, and with that backlog, the number of asylum decisions that have "shocked" the judicial conscience.

Lacking such a revamped system, or some better alternative, it is likely that any body charged with reviewing initial asylum determinations, if it does its job competently, will find itself in the same adversary relationship with the initial decision maker that the federal courts presently find themselves in. Thus, any good alternative to the present review system cannot be expected to rubberstamp initial decisions which are procedurally defective, or made in apparent bad faith. Yet it can be expected

to simplify the process of review, and to disentangle it from considerations of exclusion and deportation matters having no relation to the special status of asylum. More particularly, it can be expected to reduce the amount of paper-shuffling between levels of the bureaucracy, and to provide for the applicant denied asylum--or the government unhappy with an asylum decision--one appeal, and one appeal only, of the questioned decision.

But what body should hear that appeal? As I understand the administration's proposal, they would like to see all appeals handled by the Attorney General on a discretionary, "certiorari" basis. Such an arrangement would leave essentially intact that part of the present system whereby the Board of Immigration Appeals, on a selective basis, hears exclusion and deportation appeals. Such improvements in administrative efficiency as might occur would probably result from streamlining the initial hearing process, perhaps by abandoning the present charade that the State Department at one or several levels of that process is capable of providing individualized "advisory opinions". It is doubtful that Congress could, consistent with the Constitution, deprive any detained alien, excludable or deportable, of an additional habeas corpus hearing. Deportable aliens would retain their rights to appeal final orders of deportation, although the subject matter of such an appeal could probably be limited to non-asylum matters.

In summary, I believe that the administration's proposal could lead to more expeditious review of asylum cases. My concern, however, is that the system, as proposed, would do little to insure that the initial decision-maker is in fact affording applicants their Protocol rights. It is absolutely essential, I believe, if the reviewing body is to provide the requisite discipline, that it be independent of the Justice Department which is, and ought to be, primarily an enforcement agency, and that it have an essentially judicial, rather than political, character.

Should the Board of Immigration Appeals ever be transformed into an Article I court, its acceptability as an asylum review body would be much greater. However, I still believe, as I did last year when I reported to the Select Commission, that a statutory "Asylum Review Board," designed solely to hear asylum appeals, with a membership drawn from both political parties, sitting for fixed terms, and subject to Senate confirmation, is preferable to either of the foregoing alternatives. Like similar bodies in a number of European countries, such a board could be expected over the course of time to develop considerable asylum expertise, and could carry out selective de novo review. It would also be immune from immediate political pressures.

Finally, I would urge the Congress to consider carefully a fourth alternative. That alternative would be to permit the United States Courts of Appeals, on a "certiorari" basis, review all initial asylum decisions, including decisions affecting excludable, rather than deportable, aliens. Under such a procedure, all intermediate levels of review could be dropped. Provisions could be made for considering asylum questions separately from other deportation questions within the context of a single judicial hearing. The independence of the judiciary would ensure fairness, and because review would be discretionary, only meritorious asylum appeals would be heard.

I believe that this sort of review mechanism would adequately protect the rights of those seeking asylum, and in this respect is much superior to the administration's proposed system. Nevertheless, it has several apparent weaknesses that ought to be addressed:

First, it is likely to substantially increase the case loads of the Courts of Appeals, and particularly of the Fifth Circuit;

Second, the Courts of Appeals are not usually in the position to hear cases on short notice; yet any effective asylum appeals system, particularly as it addresses the situation of excludable aliens, must work with dispatch; and

Third, the Courts of Appeals are not the appropriate body to initiate *de novo* review, which may sometimes be advisable.

Before determining what method of asylum review to adopt, this subcommittee and congress as a whole will have to carefully weigh and balance considerations of efficiency and due process. I will close by expressing my hope that in so doing, neither forgets that the underlying purpose of all asylum law is the protection of those threatened with persecution.

Senator SIMPSON. Thank you very much. Professor Martin?

STATEMENT OF DAVID A. MARTIN, PROFESSOR, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA.

Mr. MARTIN. Thank you, Mr. Chairman.

I appreciate being invited to testify on this important issue.

Before I joined the faculty at Virginia, I worked for 2 years in the State Department in the Human Rights and Humanitarian Affairs Bureau, where I had many occasions to deal with refugee and asylum issues, and to work on the Refugee Act of 1980.

This has been a major topic, this question of asylum adjudication. It is something to which we gave far too little attention at the time when the Refugee Act was being drafted and passed, but frankly, it was not the key issue then. The key issue was the overseas refugee program, and that program claimed the major portion of the attention in the work on that particular act.

Today it is clearer that the question of asylum adjudication is the crucial matter in curing a great many of the ills that people have perceived in our immigration system.

People are going to continue to arrive and apply for asylum. We will have expenditures for care and maintenance of those people if they are detained. We will inevitably require expenditures by some level of government, public assistance of some kind, even if they are released from detention centers while applications are pending.

Equally important, there is a considerable hardship under the current system when applicants who do have valid claims remain in a kind of administrative limbo for a long period of time. They may be authorized to work, but it is hard for them to get the kind of employment and to establish their lives here in a way that can lead to self-sufficiency. These are people we ought to be welcoming. In considering our system for asylum adjudications, we should focus as much on the importance of expeditious grants in meritorious cases as expeditious denials in other cases.

Furthermore, the most effective possible deterrent to people who would come and file borderline or frivolous asylum applications is

going to be the ability promptly to say no in those cases, and then to enforce promptly the resulting order by returning them to their home countries.

Lacking that ability we have turned to several other measures in a somewhat desperate effort to find a deterrent. Those measures include extensive detention of applicants and the current interdiction program which, it seems to me, is not well advised and ultimately not terribly effective in dealing with the real problem.

I am concerned that the current interdiction effort diverts a lot of attention from focusing on this adjudication issue. Even with interdiction, we still need a good asylum adjudication system for those who continue to arrive. Prompt adjudication is the real element that will provide any necessary deterrent.

I think we need essentially two things in the improvement of asylum adjudication. I have outlined these at greater length in my prepared testimony and I request that my full statement be included in the record.

Senator SIMPSON. Without objection.

CLARIFICATION OF THE STANDARD

Mr. MARTIN. The first thing we need is a clarification of exactly what our adjudication standard means. I do not think we need statutory changes with respect to that. The standard, as you know, is a "well-founded fear of persecution" based on the five factors that are listed. It is derived from an international treaty. We have 30 years of international practice in applying and construing it, and we ought to stick with that and not change that formulation.

Nevertheless, it is quite possible to look at that standard and to think at least at first glance that, well, maybe this means anybody that comes from a regime that engages in human rights abuses has a right to stay here until those human rights abuses have ended.

That is an attractive and appealing humanitarian response, but ultimately we cannot sustain a policy along those lines. We cannot be sure we will sustain protection for those who are really in the most serious jeopardy if we try to include too wide a group of people in the protected category.

In fact, U.S. case law and international practice in applying this particular standard, I think, demonstrate that it is, in fact, a narrow standard.

I would suggest a guideline for construing that standard, one that needs to be reaffirmed, probably in the legislative history of any new legislation—one that we tried to use while I was at the State Department. The individual applicant must demonstrate some good reason to believe that he or she is likely to be targeted for persecution upon return to the home country. A showing that the home government engages in human rights abuses furnishes important evidence, but it is not sufficient by itself. There needs to be some showing of why that government would be interested in the particular applicant.

Applied in that fashion, the "well-founded fear of persecution" test is a sufficiently narrow standard that it meets many of the concerns people have expressed—concerns that we have a wide-open and unlimited system. I think those limits are ones we can

live with, and I believe we do not want to be in a position of sending anyone back to the home country who meets that particular standard.

ADJUDICATION PROCEDURES

As to procedures, I would agree in large measure with Professor Scanlan's suggestions—and I have outlined my own suggestions in more detail in my prepared testimony. I think the centerpiece has to be a skilled professional corps of asylum adjudicators.

The individual applicant should have ample opportunity to prepare his or her own submission, and to add to that submission any documents, affidavits, studies, articles—whatever that person would like to add. The major hearing then would be essentially an interview of the individual applicant by the asylum adjudicator.

The hearing should be largely a non-adversarial proceeding, although there should be ample opportunity for that person to put on whatever testimony or information he wants to provide. It will be as much the responsibility of the adjudicator to help an untutored applicant flesh out the full dimensions of the claim as it is to detect and deny those claims that are invalid.

I think that applicants should have the right to representation, to an attorney at no government expense, to help in preparing the application form and to be present as an advisor during the hearing; but not to play a major role during those proceedings.

This is essentially a non-adversarial model. It is substantially different from the one we are usually comfortable with in our system. I am convinced that that is appropriate in this limited kind of case because of the unique sort of fact-finding required, and the predictive kind of conclusion that has to be reached in these particular circumstances.

As to appeal, I think there should be an appeal board, an administrative appeal board. Judicial review should remain available, except in emergencies when the numbers are very high. There is one important measure, however, that would eliminate a lot of the perceived problems with judicial review: A provision that would make it quite clear that there can be no collateral or interlocutory review of asylum decisions or the procedures used to adjudicate asylum applications.

I understand there have been many court findings of improper procedures in the past. This restriction of judicial review has to go hand in hand with measures that clean up the administrative system to begin with. But I think precluding collateral or interlocutory review in that form will confine judicial review to a manageable dimension.

[The prepared statement of Mr. Martin follows:]

PREPARED STATEMENT OF DAVID A. MARTIN

Thank you, Mr. Chairman. My name is David Martin and I am Assistant Professor of Law at the University of Virginia. Before joining the law faculty, I served for two years in the Bureau of Human Rights and Humanitarian Affairs at the Department of State, where I worked frequently on refugee and asylum issues and participated heavily in the Department's work on the Refugee Act of 1980. I now teach a seminar in International Human Rights Law, and a substantial portion of the course is devoted to refugee law--both U.S. and international provisions.

I was pleased to receive your invitation to testify on this important subject. Crafting a fair and expeditious procedure for determining the merit of asylum applications is the key to solving a wide range of problems that have soured the public on immigration generally and refugee programs in particular since the Cuban flotilla. For example, should federal, state, or local government provide assistance to asylum applicants awaiting a decision? Should applicants be allowed to work? Should they all be detained? Those questions stir far less emotion if we are assured that the applicant stage lasts only a few weeks or months before either a grant of asylum or actual return to the home country, rather than the period of years currently in prospect. Cutting across these problems has been a fear that making life even minimally decent for asylum applicants tempts others to test, stretch and distort the limits of our commitment as a haven for those facing persecution. Promptly returning undeserving applicants to the home country furnishes the best possible deterrent to the migration of those who do not qualify. Lacking the ability to do that over the last several years, this country has gone to embarrassing lengths to patch together other kinds of deterrents, trying such measures as prolonged detention of those who are applicants, denial of work permits or other forms of assistance during the application stage, and finally the current--in my view quite misguided--effort to interdict Haitian boats. Perhaps just as damaging, bona fide claims are delayed and often mishandled, leaving persons whom we should be glad to protect either in detention or in administrative limbo for unconscionably long periods.

The Present System

The various pieces of the existing system for asylum adjudications fit together poorly. Many times I have heard INS officials speak as though the really important decisions in every asylum case are made by the reviewing staff at the State Department. This view is mistaken but understandable. Determining the validity of a claim to asylum requires a prediction about what may happen in a foreign country--that is, whether the applicant is likely to face persecution upon return home--and the State Department is the repository of much of our most current information about conditions in those countries. But people seem sometimes to think that the Department, in passing on asylum applications, is able to check its files or cable the embassy for precise information on each individual claimant. This is rarely the case. Such information is generally unavailable unless the individual was a prominent political figure in his or her home country before departure. In most cases, State lacks knowledge about the individual beyond what appears in the file received from INS, and the Department's acquaintance with conditions in foreign countries helps little in the actual adjudication. Knowing such conditions merely furnishes a rough guess about the plausibility of the persecution risk that is claimed. If the applicant faced return to Idi Amin's Uganda, for example, from that fact alone one knows that the risk of persecution was probably high. If the applicant came from Canada, on the other hand, one can say persecution is virtually ruled out. Most applicants, however, come from countries that fall somewhere in between: persecution by the government is not unknown, but it is not indiscriminate. Whether a particular applicant is likely to face it depends entirely on that individual's own circumstances.

We at the State Department therefore usually considered that the really important part of the adjudication process occurred at the Immigration Service, and I remain convinced of that view. Those who receive the application papers and conduct the initial interviews are in the best position to evaluate the credibility of the applicant, to probe the applicant's account of any events that allegedly gave rise to the fear of persecution, and to clarify the type and level of any political activity in which the applicant has engaged. Never-

theless, it was clear from the files we received that the interviewing officials often were not adequately prepared to pursue the necessary questions.

Apart from these two agencies, the courts ultimately play a major role in the overall functioning of our asylum adjudication system. At present, there are too many avenues for court intervention in the process, including collateral and interlocutory review of decisions and procedures. In addition, there have been sweeping injunctions entered in some class actions, tying up asylum proceedings far beyond what would seem to have been necessary to guard the interest of litigants in particular cases. In any event, administrative problems and judicial intervention have combined to prolong a great many asylum cases over a period of several years and to cause many participants to despair of ever reaching finality if the applicant chooses to contest the case vigorously.

The Refugee Act

These various defects were not remedied when Congress passed the Refugee Act of 1980. Indeed, I know as a participant in the effort to bring about passage of that Act that asylum issues came under serious consideration only late in the game; the primary focus always rested on our overseas refugee programs. Nevertheless, the Act did work some modest but important changes affecting asylum, changes which should not be undone. For the first time, it established a separate immigration status known as "asylum," replacing the scattered collection of "statuses" such as parole, indefinite involuntary departure, or stay of deportation previously used for those who qualified for this protection. Moreover, in the 1980 legislation Congress altered § 243(h) of the Immigration and Nationality Act to make it a mandatory provision shielding those who face persecution--with certain narrow exceptions--from return to the homeland. This change brought our domestic law formally into line with our treaty obligations, as set forth in the UN Protocol Relating to the Status of Refugees, to which we acceded in 1968.

The Refugee Act, however, never became the occasion for a thoroughgoing reconsideration of the problems in the asylum adjudication process, largely because those problems really did not become fully apparent until after the Act was in place. The taming of that process remains the major unfinished business left by the Refugee Act. It is essential that the new immigration reform legislation be the occasion for completing that work.

What Is Needed

In essence, we now need two things that we did not get from the Refugee Act; only the second requires statutory changes. The first involves the familiar formula that constitutes the crucial standard for judging asylum applications: "a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion." The wording is drawn from a treaty and should not be changed. But we decidedly do need, as a nation and as a government, to achieve some shared consensus as to just what that standard really means. Second, we need an expeditious, fair, and professional process for applying that standard in individual cases.

The Standard

The "well founded fear of persecution" formulation, as the Committee well knows, comes from the 1951 UN Convention Relating to the Status of Refugees. The United States is a party to the Convention only derivatively, as a result of our ratification, in 1968, of the Protocol Relating to the Status of Refugees. We ratified that instrument somewhat casually, after minimal discussion in the Senate Foreign Relations Committee and abbreviated floor consideration. As a result, ratification provided no occasion for collective consensus-building on just what are the limits of our obligations under the Protocol. Some still seem to think that the Protocol codified or should codify the standard emblazoned on the Statute of Liberty: "huddled masses" or "wretched refuse of teeming shores." Others seem to find only the victims of left-wing or Communist regimes fitting within the standard. And there are still other views. Many of the ostensibly erratic shifts in asylum policy

stem, I believe, from our failure to reach a unified understanding on the content of the standard. Likewise, the pronounced willingness of some courts to intervene in asylum processing often derives from the same failure, leaving the court to operate from a different and wider conception than that which informs the administrative process.

One possible misconception about the standard should be laid to rest at the outset. Asylum adjudication does not require placing an applicant into one of two mutually exclusive boxes, one being "political refugee," and the other "economic migrant." Press accounts frequently are written as though the government must make that sort of stark "either-or" decision, and they often suggest that our government makes those judgments sweepingly, as to entire groups. Both the sharp distinction and the suggestion of group judgments are mistaken.

Nearly all those who uproot from their native country to seek a new life in a distant land act for a complicated mix of reasons. The boat people of Haiti, like those from Cuba or Indochina, have a variety of political, economic, family, personal and other motives prompting their departure. The same is true of Soviet emigres, Ethiopian expatriates, Salvadorans, Chileans. Every case, in other words, falls somewhere on a continuum. At one pole is a former torture victim, now escaped, whose fear of persecution clearly overshadows any other motive for migration. At the other pole are abusive applications by person who came for adventure or employment, having no plausible risk of mistreatment on return. The overwhelming majority of cases fall somewhere in between, lodged by people with some plausible reason to worry about mistreatment by their government, but also drawn by employment prospects or family ties. If a person comes from a country whose government is known to have persecuted some of its citizens, that applicant may validly claim some reasonable foundation for a fear of persecution were he to return. His fear is not fanciful or bogus. But the key issue is whether there is a sufficient foundation so that the asserted fear meets the statutory threshold of "well-founded." Locating the threshold is a question of how far down the continuum we wish to move, expanding beyond the core category of former torture victims.

The controversy in this nation over treatment of Haitian asylum applicants, stripped of its often heated rhetoric, amounts to a dispute over the breadth of that standard and where the cut-off line falls on the continuum. It is very appealing, from a humanitarian perspective, to embrace a broad group within the asylum standard and to grant asylum whenever there is any shred of reason to believe that the claimed fear of governmental abuse is legitimate. And the record of the Duvalier government in Haiti certainly contains enough documented instances of severe human rights abuses to give some foundation to any Haitian's claim of a fear of persecution.

I am convinced, however, that we should resist that initially appealing humanitarian approach, because I do not think we could then sustain, over the long run, the national consensus needed to keep open our offer of asylum, even for those most severely at risk. Asylum is a wild-card in the immigration deck. It opens up prospects of admission to the United States outside of any quotas or pre-screening. Unless carefully administered, it can mushroom out of any reasonable proportion. The sometimes ugly public reaction to the Cuban influx in 1980 gives a taste of the kind of backlash possible when this happens. In order to remain confident, then, that we can continue to extend asylum to those in the greatest jeopardy, this nation should refrain from trying to expand protection to too broad a group. Asylum in the United States simply cannot provide any major part of the answer to human rights abuses around the world. We should strive instead to take every opportunity to promote reform and amelioration in the home country. I regret that the current Administration seems to let more and more of those opportunities slip away.

I would propose a useful guideline in achieving an appropriately limited standard, albeit a standard that embraces more than simply victims of past persecution. It is this: We should continue to require that the claimant show a substantial reason why he, or an ethnic, religious or other group to which he belongs, is likely to be targeted--singled out--for persecution upon return to the home country. Mere demonstration that the home government in fact has been known to persecute is not sufficient. The applicant needs to

show some plausible reason why that government would be interested in him. This limiting interpretation is solidly grounded in United States precedents and also in international practice. It is the interpretation we worked to apply while I was at the State Department. That it coincides with the international standard is attested by the fact that the office of the UN High Commissioner for Refugees (UNHCR) agreed with State's final recommendation on every Haitian application reviewed during that period. Most of those recommendations were for denying asylum.

If Congress is to use the current immigration debate to build a new consensus along the lines I have outlined, it should send a two-fold message. First, the asylum standard, appropriately understood, extends protection to only a rather narrow group of potential applicants--those who can show they are likely to be singled out for persecution. But second, having drawn the line at that point on the continuum, Congress should make it quite clear that protection is then extended not grudgingly but willingly, in accordance with the best in American tradition of caring for the oppressed, and despite the rather untidy and unplanned nature of the arrival of asylum claimants.

There is a further corollary. Application of the standard does not depend on whether the home regime is an ally or an adversary. We should make sure that our foreign policy agenda does not dictate the outcome in particular cases. At every possible point, we should decide cases based on their own individual merits, and let the foreign policy chips fall where they may. Operationally, this calls for minimizing the role of the State Department in the final determination, both because of the inevitable temptation to let foreign policy interfere with decisions in particular cases, and also to fortify any U.S. diplomat called on the carpet in a foreign capital after U.S. asylum has been extended to one of the host country's nationals. He should be able to demonstrate convincingly that that decision was made by an independent body and that asylum grants and denials are simply not part of the diplomatic repertoire used to administer insults or favors in our foreign policy process.

If you disagree with the precise understanding of the "well-founded fear" standard that I have advanced, I hope you might nonetheless agree that consensus needs to be built. If Congress provides a clear signal, of whatever precise content, on how to apply this standard, it should serve to help unify administrative and judicial practice on the point.

The Adjudication Process

The asylum adjudication process should be designed to maximize fairness and accuracy in the individual determinations, whatever the stripe of the home government. A second goal is this: In order to guarantee prompt recognition in meritorious cases and also to secure prompt denials of nonmeritorious claims--thereby deterring others who would test the limits--the adjudication process must function expeditiously. A well-functioning adjudication system that can achieve final decisions and enforce them will dramatically reduce most other expenses associated with asylum. At present we carry extensive care and maintenance costs for applicants detained pending final adjudication. Those released during this period often require public assistance from federal, state, or local governments. Even if they are authorized to work while the application is pending, their tenuous status interferes with securing the kind of employment that makes for long-term self-sufficiency in our society. And physically returning unsuccessful claimants should deter others from coming, thus reducing the caseload and rendering unnecessary expensive schemes for interdiction on the high seas. By any measure, prompt adjudications will enable extensive savings of resources devoted to other functions. For this reason, we should not be stingy in spending the sums necessary to create an adequate structure for asylum adjudications.

The key element in the adjudication scheme should be a corps of specialized asylum adjudicators. The Select Commission on Immigration and Refugee Policy suggested this basic approach, and the Reagan administration has also endorsed the idea. These adjudicators could be established as a separate unit within INS, or perhaps better, as a separate entity within the Justice Department, clearly divorced from general enforcement duties or other INS functions.

Asylum decisions are sufficiently different from the run-of-the-mill immigration matters to justify a separate unit. Such adjudications require some familiarity with conditions in foreign countries, and more importantly, detailed acquaintance with the relevant legal standards, and skill and training in interviewing techniques designed to elicit the most important information. Asylum adjudicators should be given sufficient salary and administrative support to make theirs an attractive and long-term career position. Their training should impart the above skills and knowledge, and should also be designed to instill a commitment to accurate, fair decisionmaking. All adjudicators must appreciate that they are commissioned as much to fulfill the nation's pledge of asylum to those truly facing persecution as they are to deny asylum in nonqualifying cases.

In the past, INS's procedures for asylum adjudication have gone through an embarrassing and confusing oscillation between two different models. One is an adversary model familiar to lawyers and patterned after the protections available in U.S. courtrooms; the second is a nonadversarial model. Originally INS's regulations called for the asylum decision in exclusion cases to be made by the district director based on an interview by an immigration officer. Due process objections were lodged against this procedure, the claim being that fairness could only be guaranteed in an evidentiary hearing with the more extensive procedural trappings of the adversary model. The District Court ^{looked favorably on} ~~sustained~~ the due process objections; the Fifth Circuit ^{disagreed} ~~reversed~~. Before the Supreme Court reviewed the issue, the Carter administration voluntarily agreed to adopt new regulations that would give everyone the opportunity of an evidentiary hearing clearly an embrace of the adversarial model. When new regulations were issued in 1979, however, a minor uproar of an opposite character emerged. Critics pointed out that many asylum applicants are unfamiliar with American courtroom ways and generally are cowed by formal encounters with authority. Only in a nonadversarial setting, it was argued, could such individuals fully demonstrate the bona fides of their asylum claims. This argument received a sympathetic hearing during some of the deliberations on the Refugee Act, resulting in legislative history calling for some move back in the direction of this nonadversarial process. The

June 1980 asylum regulations therefore provide for both an initial interview and decision by the district director and later, if the alien pursues the case, a de novo evidentiary hearing before an immigration judge.

There is some merit, of course, in both models, but the schizophrenia of the current process has only served to prolong and complicate asylum adjudications--a problem compounded by the fluctuations displayed in successive sets of regulations. If the process is to be expeditious, there must be one basic factfinding procedure followed by limited review on the record--no de novo proceedings.

In my view, that basic procedure should be built essentially on the nonadversarial model, with sufficient modification to assure that the applicant has a full opportunity to make his case. That model better fits the usual course of decisionmaking for one fundamental reason: the key evidence in nearly every asylum case will be the individual applicant's own story. The applicant ordinarily does not require the usual protection of confronting and cross-examining witnesses against him, for the simple reason that there rarely are such witnesses.

The asylum adjudicator should therefore function roughly like the civil law's examining magistrate. This is sufficiently different from the usual roles in our Anglo-American legal system that it merits special emphasis in the training of adjudicators. They must understand that they have an obligation as much to flesh out valid claims incompletely presented as to detect contradictions in the stories of nonmeritorious applicants. The applicant should be provided a reasonable time to prepare his application, answering the questions on the basic application form and supplementing those answers with whatever affidavits, newspaper articles, scholarly studies, or other information he may choose to provide. The oral part of any hearing would then concentrate on an interview of the applicant himself, although the adjudicator would have discretion to permit others to offer testimony in cases where it appears that oral evidence would materially supplement the available information. There should be no automatic requirement of corroboration of the applicant's story. Many applicants with valid claims simply will

not be in a position to locate corroborating witnesses or provide supporting documentation addressing their own individual cases. Obviously the government must provide a qualified interpreter.

After the oral hearing, the asylum adjudicator should prepare a written decision, summarizing the evidence and explaining the reasons for granting or denying the application.

Attorneys

The applicant should be entitled to the assistance of an attorney, at no government expense, both in the preparation of the application and supporting materials and as an advisor during the oral hearing. Ordinarily, however, the attorney would have no role in the questioning of the applicant or the cross-examination of any other witnesses, although the asylum adjudicator would retain discretion to allow the applicant's attorney to play a broader role if he deems it necessary or useful. In those rare cases where there are adverse witnesses, it is probably prudent to allow the applicant's attorney to cross-examine, but this would be a decision for the adjudicator in the first instance.

There has been a problem, particularly in Florida, because of the relatively small number of attorneys available and willing to help asylum applicants when few applicants are able to pay for their services. Whenever the number of arriving applicants exceeds the capacity of available attorneys, this will remain a nagging and troubling problem, and no solution will be completely satisfactory. But the regular adjudication process cannot be left utterly dependent on the number of volunteer attorneys. To avoid a debilitating backlog, ultimately adjudications must keep pace with arrivals, even if arrivals outpace attorney availability. The legislation should require that reasonable accommodation be made to enable live attorney representation at the hearing, but authorize the adjudicator to proceed if attorneys are not available after such reasonable steps to accommodate their schedules. If the adjudicators take seriously their responsibilities to explore fully the applicant's case, the absence of an attorney in such circumstances should not work a due process violation.

The State Department's Role

As I indicated earlier, I would advocate a much reduced role for the State Department in asylum adjudication. Individual case files should not be sent to State on a routine basis. Instead, the asylum adjudicator should be empowered to ask the State Department for specific information when he believes such information would be helpful, although such requests should be rare. For example, a particular claimant's case may include as an important component the allegation that his father served as finance minister in a regime recently ousted in a coup. The asylum adjudicator could ask the State Department for confirmation or refutation of this claim. The adjudicator should not routinely ask the Department for information about individuals who were not prominent figures in their home countries or about whom the State Department is unlikely to have readily available information.

The Select Commission also suggested that the State Department should prepare group profiles, country by country, that might help guide decisions about specific asylum applicants. ^{Support that appeared;} I ~~have nothing~~ ^{is a far} ~~against group profiles; indeed, I think this~~ ^{is a far} better use of State's expertise and resources than review of individual cases. But I think the Commission decidedly exaggerated their likely utility. Country profiles will be of significant assistance only where the claimed persecution is based on group characteristics. For example, the State Department might issue a profile stating that adherents of the Ba'h'ai faith would face persecution if returned to Iran. The adjudicator then need only decide whether or not the individual before him is truly a Ba'h'ai from Iran. He may take official notice of the "legislative fact" set forth in the country profile. (See Zamora v. INS, 534 F.2d 1055 (2d Cir. 1976).) Such profiles, if they are used, should be public documents, and applicants should be entitled to rely on them, thus dispensing, in the cited example, with their ordinary burden of offering proof that Ba'h'ais are persecuted in Iran. But even in claims based on group characteristics, the absence of a Department profile should not absolutely foreclose the claim. The Department may be simply unaware of persecution directed at particular groups, especially if the practice is highly

localized, and there is always room for politically motivated shadings or a judgment call as to whether the abuse is severe enough to merit the label "persecution."

In any event, the overwhelming majority of asylum claims are based not on group-based abuses but on persecution feared because of the applicant's own political opinion. In such cases, to know that the regime has sometimes persecuted its political opponents offers extremely little guidance in deciding the individual asylum case. What kinds of political activity has the individual engaged in? Were there specific earlier events of threats or abuse directed at the applicant or his colleagues that helps fortify the claimed fear of persecution? How long after those events did the applicant flee? What happened in the interim? These are inevitably individualized determinations, and country profiles will help little.

UNHCR Involvement

If the State Department no longer reviews individual case files, it can no longer be the point at which UNHCR offers its advice on those cases. Since 1977 UNHCR has played an important and constructive advisory role regarding applications by Haitians, and I believe the advisory role has been expanded to other nationalities since 1980. Such review provides an added check on the fairness of the decisionmaking, and it underscores the U.S.'s commitment to treating refugees as an issue of international concern. UNHCR participation can be managed so that it does not cause any undue delay in the processing; indeed, UNHCR's role in most cases of which I know required simply a reading of the file and a quick notation of concurrence in the proposed State Department advice letter.

The asylum adjudicators form the logical point for UNHCR involvement under the proposed system. Statutory provision for such advice is probably not the best course. I would recommend that Congress endorse in the legislative history the continuation of an advisory role for UNHCR, subject to appropriate arrangements for location, staffing, and timely review. Precise arrangements could then be embodied in the regulations precisely defining the adjudicator's responsibilities, thus permitting some flexibility to modify

those arrangements as experience is gained. UNHCR's role would be advisory only. U.S. officials would retain final authority and responsibility for the adjudication.

Exclusion and Deportation

The same procedures should apply for asylum adjudication, regardless of whether the applicant is in exclusion proceedings or deportation proceedings. As soon as the asylum claim is lodged, this issue should be split off and assigned to the asylum adjudicator. If asylum is granted, that decision renders moot other possible questions. If not, the case could be returned to the regular process --either exclusion or deportation, as the case may be--for adjudication of any other issues. It is just as important to bring to bear this professional, expert, specially tailored fact-finding process on claims made by applicants for admission as it is for those who have already entered the United States.

Appeal

The most important consideration is that this basic fact-finding proceeding be fair and expeditious, compiling a reasonable record (the applicant's submissions, ^{the hearing transcript, and the INS file, and} ~~the~~ the written decision discussing the evidence) for any further review. The resulting decision then can be incorporated into whatever structure for administrative and judicial review the Congress chooses to create for immigration cases generally, although it should be overturned only ^{if found to be} ~~for abuse~~ ^{arbitrary and capricious} ~~of discretion.~~

I understand that consideration has been given in some circles to foreclosing judicial review entirely, at least in some categories of cases. In my view, that would be an unwise overreaction to past instances where courts--I would agree--have indulged in costly and questionable collateral review. The availability of judicial review can serve as an important check on abuses and errors, and it should not be eliminated. More pragmatically, a scheme that purports to close out judicial review entirely virtually invites litigants to find some unpredicted avenue for securing court consideration, probably under the ostensible command of some constitutional guarantee. It seems better to provide for one clear line of direct review, one

time only, for unified consideration of the asylum claim along with any other issues in the case. The courts of appeals, in my view, are the appropriate court, and the review statute should clearly authorize summary affirmance of the administrative decision whenever the case merits such treatment. The legislation should make abundantly clear that no collateral or interlocutory review, in any manner, of any decision by the asylum adjudicator or of any of the procedures employed in asylum adjudications is permissible.

The Reagan administration has proposed that asylum officers' decisions be administratively final, subject only to review on certification by the Attorney General. I would favor instead a specialized asylum review board that could receive and review appeals in any asylum case. But the costs in terms of delay may be judged too high. In any event, it is wise to maintain at least a discretionary administrative review procedure like certification, to be used as a check against any adjudicator's wide departure from the statutory standard--in the direction of either excessive harshness or excessive leniency.

Emergencies

The administration will apparently propose legislation authorizing a wide array of measures that might be undertaken in immigration emergencies. The precise criteria for declaration of such an emergency should be carefully scrutinized, but it is prudent to have in place a statutory scheme to be applied when extraordinarily large numbers of persons arrive in a short period of time. We had done little such advance planning before the 1980 flotilla, and our response suffered as a result.

I do not propose to address all facets of an emergency, but I would note that an existing and functioning corps of asylum officers could provide a crucial component for any asylum adjudication system to operate during such an emergency. Within certain safeguards, they might be allowed to take applications orally and to render decisions based solely on the oral interview. The layers of review or appeal could be reduced or eliminated. Such quick determinations contain obvious potential for error and abuse, and they should be used only in strict emergencies. Nevertheless, one does not need an excessively

fertile imagination to envision new situations in which a large number of asylum claims are lodged in a short period of time and in which prompt adjudication would materially aid resolution of the crisis.

The Congress should consider one other matter in connection with planning for emergencies. It is quite possible that we will receive any future large-scale influx as a result of war or civil strife in the migrant's nearby home country, rather than wide-scale persecution. Those who flee wars are commonly thought of as "refugees," yet they do not in most cases fit the definition of "refugee" provided in the UN Convention and in U.S. law. They flee to get out of the way of the bombs and the bullets, and not to avoid persecution targeted at them based on their political opinions. We are not strictly obligated to allow such people to stay, and presumably any asylum claims based on that state of facts would be promptly denied. Nevertheless, it is inhumane to send people back to the midst of a shooting war in its most violent stages. In the past, the State Department and the INS have accommodated this humanitarian need by occasional decisions to extend blanket voluntary departure status to all nationals of a certain country. This happened with Ethiopia in the mid-70's, and again with Nicaragua from 1979 through late 1980. If we are again faced with a large-scale influx based on such circumstances, we probably will not want to extend full asylum status, but Congress might give thought to providing some arrangements more precisely tailored than extended voluntary departure for sheltering such persons.

Timeliness

Some consideration has apparently been given to precluding asylum applications by illegal entrants, unless the applications are lodged within a short period of time after the initial entry. The idea for such preclusion may be based on a reading of Article 31, paragraph 1 of the United Nation Convention, which forbids penalizing refugees who enter illegally if they present themselves promptly to the authorities and show good cause for their unauthorized presence. By implication, Article 31(1) permits imposition of penalties on those who do not present themselves promptly. But that Article should not

be read for more than it allows. Article 31(1) does not go so far as to authorize the return of the individual applicant to his home country as a penalty for failure to present his claim promptly. Even those who are extraordinarily tardy in lodging their claims to refugee status can claim protection under Article 33 against return "in any manner whatsoever" to any territory where their lives or freedom would be threatened. The desire to put teeth in a requirement that any asylum claims be promptly filed is understandable, but any absolute rule precluding later filings by illegal entrants is unduly harsh and may place us in violation of our treaty obligation.

Conclusion

I hope these reflections on asylum adjudication will be of assistance to the Subcommittee in its important deliberations. It is essential that we design and implement a fair but expeditious asylum proceeding that can reach finality within a reasonable period of time, and move us away from the convoluted paralysis of the recent past. But it is just as important not to lose sight of the essential commitment at the foundation of the asylum provisions in our treaty and statutory law. The adjudication procedure should equally make real the availability of protection for those who are truly in jeopardy of persecution, no matter what the character of the regime they are fleeing.

Thank you for inviting me here today. I will be happy to respond to questions.

Senator SIMPSON. Thank you very much.
Professor Richard Boswell, please.

**STATEMENT OF RICHARD A. BOSWELL, PROFESSOR, NATIONAL
LAW CENTER, GEORGE WASHINGTON UNIVERSITY**

Mr. BOSWELL. Mr. Chairman, I am honored for having been invited here to present my views on the adjudication of asylum claims.

My interest and concern on issues relating to asylum and other matters related to immigration law has developed over a number of years, first as a practitioner of immigration law, as a member of the faculty at George Washington University, and also as the director of the Immigration Clinic there.

During this time I have litigated, or assisted in the litigation, of numerous asylum claims as well as other claims in other areas of immigration law.

In my view, the major problems involved with asylum application adjudications is in the area not of the statute itself, but in the way that the statute has been implemented. As I stated in more description in my statement which I presented to the committee and which will presumably be admitted—

Senator SIMPSON. Indeed, it will.

Mr. BOSWELL [continuing]. I stated there that I make distinctions between—just as the Select Commission did—mass asylum adjudication as opposed to individual asylum adjudication.

In my view, as the Commission seemed to take their view of asylum claims, you must distinguish between mass applications and individual applications, and that we must look at them in terms of profiles—such as other people have pointed out to the committee—making profiles of different applicants and being able to make determinations like that.

In my experience in practice I have seen that the real problem is that the immigration officer doing the adjudicating has a problem in making a decision on a particular case, and it is not necessarily because of facts, but maybe politicalization of some kind or because the adjudicator did not have anybody pressing down on him saying, "You have got to make a decision in a very short period of time."

I do not believe that there should be too many changes made in the statute. As a matter of fact, I do not see any changes that should necessarily be made, but that what we should be doing is be concerned about making prompt decisions. The very nature of adjudication is to make a prompt decision right away or as soon as possible.

I have seen a number of applications which have extended over the period of a year or a year and-a-half, or more, without any real justification. I pointed out some in my written testimony. I think those examples point out that if you tell the Immigration Service that they must make a decision within a period of time and have that period of time specifically defined, a decision will be made.

Also, in my experience I found that judicial review is not the major portion of the time which is the cause for delay. What I believe is the cause of the delay is the period, from when the application is filed to when it reaches the Department of State. Sometimes they are even lost between the Department of State and the Immi-

gration Service, or on its return from the Department of State back to the Immigration Service.

Oftentimes when I looked over the recommendations by the Department of State those recommendations have been, as I call them, MAG-card kinds of responses. In other words, responses that do not indicate any detailed analytical review of the particular application.

So, I believe—as has been noted by other persons here—that I think the Department of State's recommendation can be eliminated. Those recommendations now, if they are favorable, the applications are at the present time granted; if they are unfavorable they are not granted. Then let them proceed on before the immigration judge, before the Board of Immigration Appeals, or the U.S. court of appeals as the case may be.

The real problems then are time delays. As a proposed solution, we should eliminate the State Department recommendation and confine the Immigration Service's decisions to a specific time period so that they have to make the decision promptly; and then we must distinguish between mass asylum applications from individual asylum applications.

An example would be if someone were applying from a country such as, say, Argentina, Venezuela, Colombia, they made an application. That application can be looked at in an individualized kind of a way whereas if we looked at an application from someone from Afghanistan, El Salvador, Haiti, or Cuba, whose applications could be looked at in a much more broad kind of fashion.

My views are very clearly laid out with respect to the administration proposal.

I commend the committee for taking on this tremendous responsibility of making these changes in immigration law. Thank you.

[The prepared statement of Mr. Boswell follows:]

PREPARED STATEMENT OF RICHARD A. BOSWELL

Mr. Chairman, members of the Sub-committee, I am honored for your having invited me to present my views on the adjudication of asylum applications. My interest and concern on this and other issues in the area of immigration law reform has developed over many years, first as a practitioner of immigration and nationality law and more recently as a faculty member at the George Washington University, National Law Center and director of the Immigration Clinic. During this time I have litigated or assisted in the litigation of numerous asylum claims.

The Problems

In my view the major problems in asylum application adjudications are not as a result of the statute, but in the Immigration Service's inabilities. These problems take on varying dimensions depending on whether we are discussing mass asylum applications, or asylum applications made by undocumented or legally admitted nonimmigrants.

A continuing problem for all asylum applicants are the extensive time delays. These time delays occur at each and every stage of the adjudicatory process: the initial filing, the forwarding of the application to the Department of State, the INS' ultimate decision and the ensuing deportation or exclusion hearing.

An additional problem rarely addressed is that of the nature of "asylum." Asylum is not just political persecution, but also encompasses religion, race, nationality, and social classes or groups. The Immigration Service and Department of State have yet to come to grips with these types of asylum claims. The end result is that these

types of applications other than "simple" claims require protracted and costly litigation.

The final problem which I wish to address concerns the application itself. Applicants are subjected not only to a lengthy and confusing application but also to lengthy questioning regarding the application. Often times the end result of this process is that the truly needy applicant is required to produce documentation establishing elements of the claim. These requirements are imposed notwithstanding the fact that it is rare for a person in genuine fear of life and limb to be preoccupied with gathering documents.

Clearly, there are other problems relating to the adjudicatory process. It is my view that these are the primary ones which can and should be addressed by the legislative process.

Comments on the Administration Proposals

The major proposals presented by the administration are bold and far reaching. They bear the appearance of being beneficial to the bona fide asylum applicant. It is my view that if two major points of the administration proposals are enacted many asylees will go underground rather than apply. I will comment on three of the administration proposals dealing with this subject: "administrative" detention, designation of "asylum officers," and limitation of the appeals process for asylum applicants.

Presently many aliens who are discovered in the U.S. after having entered without inspection are subjected to deportation proceedings where they may apply for asylum before an immigration judge. The Acting Commissioner for the INS testified before this Sub-committee on July 31, 1981. During her testimony Commissioner Meissner stated

that a great burden is being borne by the U.S. and state governments, and further that the Administration had certain proposals to expedite the exclusion process. My concern in this regard covers two areas. As explained, many persons detained in detention facilities are under deportation and not exclusion, and must be accorded due process. One should not assume that an undocumented alien's application for asylum is any different from an alien entering with a visa. My second concern is that Congress not be too quick in sanctioning the detention of asylum applicants unless it is willing to incur criticism for failing to follow standards of international human rights. In short, I believe that the use of detention facilities for asylum applicants should be extremely limited.

The Administrations proposals to limit the appeals process for asylum applicants are also troublesome. It appears that the Administration intends to limit the asylum application to the "asylum officers" and then to the Federal courts of appeals under 106(a) of the Immigration and Nationality Act. With respect to asylum applicants subject to deportation this is a drastic change. Asylum applicants subject to exclusion cannot now have their cases reviewed in the courts of appeals. The Administration's proposal curtails the function of the Board of Immigration Appeals which acts as the only sure check of administrative abuse. Furthermore this proposal also limits review before the Regional Commissioners. The importance of asylum applications is extraordinary. The fair adjudication of asylum applications can make the difference between life and death of the alien. To place this type of authority in the hands of one bureaucratic official would be dangerous. Many asylum applications are presently denied by the

District Director of the Immigration and Naturalization Service not based on legal grounds but because of a reluctance to make a far reaching decision. Fortunately many of these decisions are reversed by the Immigration Judge or the Board of Immigration Appeals. It is my view that the asylum applications require greater care than any other application handled by the INS as they can ultimately be a death sentence.

Finally, in reviewing the Administration's proposals regarding the designation of certain "asylum officers," I believe that several observations are in order. In order to adjudicate these applications properly the INS needs persons with special qualifications. INS officers presently responsible for the adjudication of asylum applications are ill-equipped to handle the responsibility. Often times they are so poorly versed in the law that they will make up new standards for the alien to meet. Presently asylum adjudicators perform a number of different tasks within the INS district office aside from asylum cases. I believe that in theory the designation of an asylum officer to handle applications is a very good proposal. I do not say this without further comment for I believe that there are some serious potential problems. First I do not believe that the proposal will work effectively. Mass asylum applications are easy to handle as these applicants fall into distinguishable and large groups. Individual asylum applicants will and should not exist in numbers large enough to keep these asylum officers busy. The only real function of a special asylum officer is in the extremely complicated case. Secondly, I do not believe that these asylum officers should be the only persons reviewing the applications. It is critical that there be further administrative review to insure fairness.

Proposals

It is my view after having spent a great deal of time preparing asylum applications and teaching immigration law that most of the problems relating to the adjudication of asylum applications are in the Immigration Service's handling of these applications. An adjudicatory responsibility means prompt adjudication within the means available to the officer. A substantial amount of time is lost not in the courts but within the INS bureaucracy. An example of this can be easily dramatized by describing an asylum application which was filed on behalf of an Afghan presently in the U.S. This person in my view has an extremely strong case for asylum as he had worked closely with the U.S. while in Afghanistan and even participated in an A.I.D. legal education program in the U.S. several years ago. Eight months after he filed his application he was called in for his first asylum interview whereupon he was told that his application was to be forwarded to the Department of State. Five months later he was told by INS that the file had been lost and that in fact it had never been sent to the Department of State for a recommendation. As of this date his application has yet to be returned from the Department of State due to their heavy case loads. This problem could have been decided by the INS had the Department of State's recommendation not been required.

In most of the cases which I have seen the Department of State recommendation showed little if any analysis, and leads me to believe that serious scrutiny is a rare occurrence. I believe that the Department of State's recommendation should not be sought and that only in those situations when the INS has made a decision should their advice be sought.

By following this procedure a prompt decision can be made without any extensive delays.

The INS is second to none in the morass of forms used to carry out its functions. A review of the asylum applications will reveal the fact that many of the questions are asked more than once. Although this appears to be minor it is amazing how some adjudications officers will pounce on the unanswered question that has been answered previously in the application. I would urge then that the Administration streamline its asylum applications.

I am in accord with the Administration's view that there be people handling asylum applications who are competent to adjudicate the claims. As stated earlier I am concerned that the designation of "asylum officers" not be used as an excuse for eliminating avenues of judicial review presently in use. The Administration's efforts' reasoning for truncating the judicial review process is that costly time is wasted in the Federal courts. In my opinion a great portion of time is wasted not in the Federal courts but in the administrative appeals process. If the INS was willing to assume full responsibility for its adjudicatory function and made prompt decisions on applications a great deal of the time would be saved. If the Service had people who were willing to make prompt decisions on applications a large portion of the time delays would be eliminated.

CONCLUSION

I do not believe that the problems in the adjudication of asylum claims are statutory. The problems are mainly in requiring a recommendation from the Department of State, and the fact that the INS does not make prompt decisions within any timetable. Many of the INS officers adjudicating these

claims are not well versed in asylum issues thereby making bad decisions on good cases.

The administration must make a distinction between mass asylum claims and the individual claims. In my view the mass asylum claims can be granted in a "blanket" fashion leaving the security agencies (NSA, CIA, etc.) with the responsibility of performing their background checks. The asylum applications falling outside of the mass applications can be handled in the normal case by case basis through the asylum officer. This asylum officer should not be insulated from administrative or judicial review as an adverse decision can many times be the equivalent to a death sentence for the alien.

Senator SIMPSON. Thank you very much, Professor Boswell.

We will hear now from the chief judge of the Board of Immigration Appeals, Mr. David Milhollan, please.

STATEMENT OF DAVID MILHOLLAN, CHAIRMAN, BOARD OF IMMIGRATION APPEALS

Mr. MILHOLLAN. Thank you, Mr. Chairman.

I would simply like to express to the committee the experiences of the Board of Immigration Appeals in adjudicating asylum claims in exclusion proceedings.

I have a prepared statement and request that it be made a part of the record.

Senator SIMPSON. It will, indeed.

Mr. MILHOLLAN. To briefly summarize, as you know, the Board of Immigration Appeals, under the present regulations, has the jurisdiction to review asylum claims made in exclusion proceedings. We have been doing that over the past fiscal year.

Now, to date—contrary to the vast number of applications that have been submitted—as far as the appeals process with the Board is concerned, we have not experienced a tremendous number of increases in asylum claims. Our principal increase has resulted from, of course, the Cuban cases. The Haitian cases are still in court and we have not experienced an increase in the Haitian cases.

The increase in all the other cases, other than Cuban, has been very, very slight. They are not the type of numbers that bother the Board in adjudicating cases.

Now, we have been adjudicating approximately 2,500 cases per year. This past fiscal year we experienced an increase of 400 cases—slightly more than 400—resulting from the Cuban exodus, that is asylum claims in exclusion proceedings. That has been the factual experience of the Board so far as asylum in exclusion proceedings is concerned.

Now, I must emphasize that the fact is, when any particular proceeding results in an increase to us of 400 cases, that is a substantial increase to us and one which we have difficulty coping with.

If and when the Haitian cases arrive at the Board, they also will present difficulties for us. So, I do not want to suggest that we are able to take care of all appeals that may be filed in the vast number of applications that have been talked about this afternoon.

But to date, Mr. Chairman, that has been our experience.

Senator SIMPSON. The 2,500, though, that is what you have been processing.

Mr. MILHOLLAN. The total number of cases, yes, sir. That includes, of course, deportation cases.

Now, in the past year the fact is that we received over 3,800 appeals; 400 of those or slightly in excess, resulted from the Cuban exodus and the balance of the increase from the Iranian situation.

[The prepared statement of Mr. Milhollan follows:]

PREPARED STATEMENT OF DAVID L. MILHOLLAN

Mr. Chairman, Members of the Committee, I appreciate this opportunity to appear before you today to testify regarding the performance of the functions of the Board of Immigration Appeals and the discharge of its responsibilities relative to asylum matters.

Consideration of asylum claims in exclusion and deportation proceedings impacts upon the Board by virtue of its appellate jurisdiction over such proceedings provided in 8 C.F.R. 3.1(b).

Prior to May 10, 1979, asylum applications could not be considered in exclusion or deportation proceedings. Such applications were decided by Immigration and Naturalization Service District Directors and there was no appeal from the District Director's decision. Consequently, neither immigration judges nor this Board reviewed asylum applications. The government, however, subsequently decided to permit those in exclusion proceedings to have their asylum applications adjudicated by the immigration judge in their hearing. Pertinent regulations were published effective May 10, 1979. The regulations were revised in implementation of the Refugee Act of 1980 and the provision allowing consideration of asylum applications in exclusion proceedings was retained. Under current regulations, the Board has jurisdiction to review asylum issues raised in exclusion and deportation proceedings.

As a result of the exclusion proceedings instituted against certain of the Cuban nationals who arrived as part of the Spring 1980 exodus from their homeland, the Board has in fact received a large number of exclusion cases involving asylum applications. To date, the Board has received over 400 exclusion cases involving Cuban asylum-seekers. Proceedings against Haitians now paroled into the United States have not impacted upon the Board. Such exclusion cases, if they occur, will most likely involve a large number of asylum requests which under present regulations can be appealed to this Board.

Inclusion of review of these cases within the Board's jurisdiction resulted in approximately 400 additional cases for the Board last year. If and when proceedings are instituted against Haitian nationals presently in the United States on parole, there may be another large number of cases for the Board to decide. However, in the absence of some extraordinary influx of people in the future, such as has recently happened in the cases of Cuban and Haitian nationals, including these issues in the Board's jurisdiction would not impose a substantial additional administrative burden upon the Board.

Senator SIMPSON. Let me just at this point for the record recognize the presence of Mr. Gary Perkins here, of the Washington Office of the United Nations High Commissioner on Refugees, who has been more than helpful as we grapple with this difficult problem.

His organization has received the Nobel Peace Prize, Both for myself and other members of the subcommittee, as well as Senator Kennedy, the ranking member of this subcommittee, I want to express our pride and commendation. We are gratified to learn that the 1980 Nobel Peace Prize has been presented to the United Nations Commissioner for Refugees, to your organization, for its work this year, as it was once before I believe in 1954.

Certainly, all of us who have struggled with this issue have followed the work of that group in every corner of the globe on matters of life and death.

Senator SIMPSON. I certainly compliment you, and that prize is richly deserved by that organization and its representative here in Washington.

Mr. PERKINS. Just one very brief point and that is, as many of you know, the reward is a public reward, and we like to share these rewards. I think first of all share them with the voluntary agencies.

We want to thank you and the members of your subcommittee for your diligent work that you are doing on this particular subject, and for the support which comes from you and the U.S. Government in so many different ways.

Senator SIMPSON. Thank you. I have certainly come to know and enjoy Commissioner Hartling and during the consultation process visited with him by phone in Geneva, and had a personal visit with him. I look forward to future associations with him. Thank you very much.

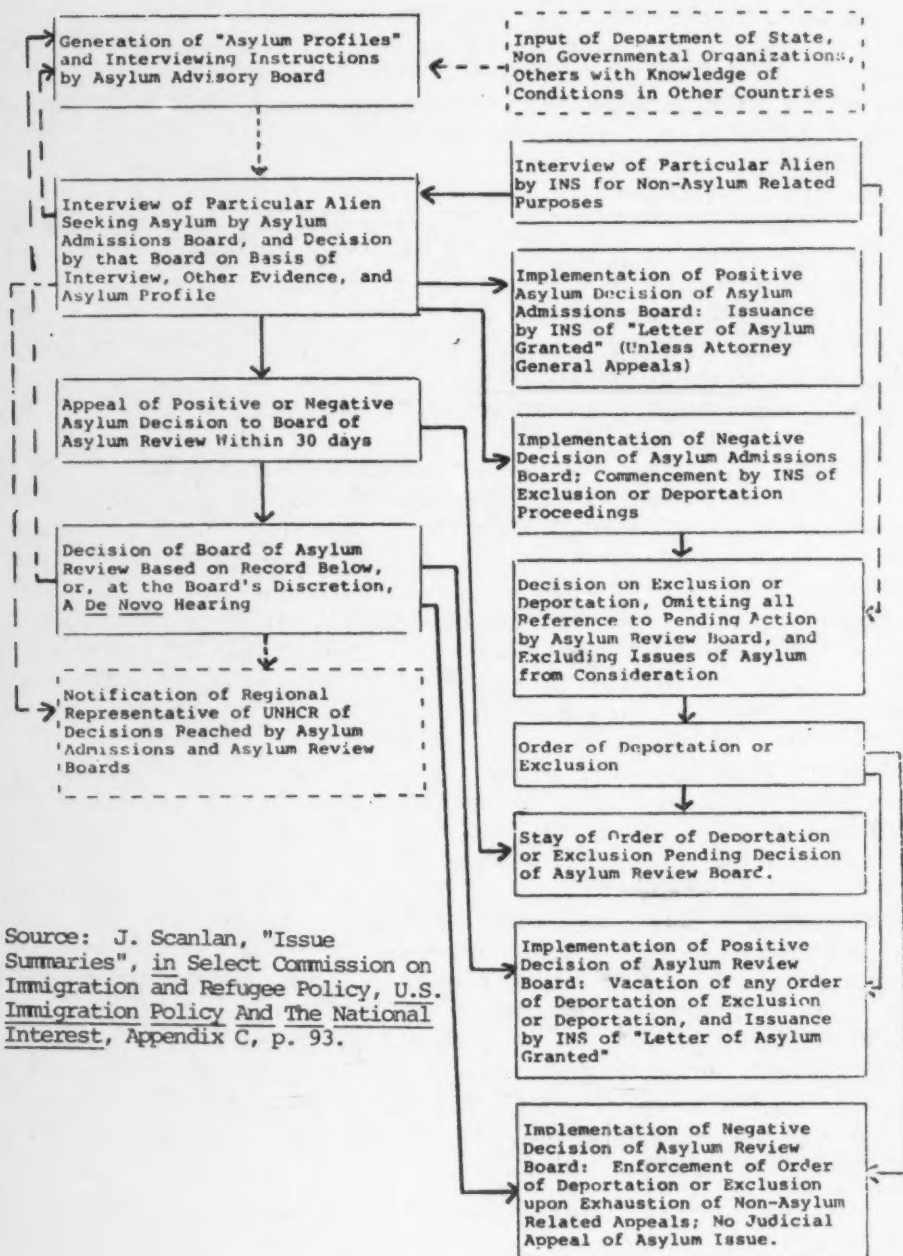
Just several questions here. I would ask Professor Scanlan, if we were focusing just on expediting the process along, speeding it up as at least the major issue, how would you restructure the present system for asylum adjudication? Just speed it along.

Mr. SCANLAN. I gave Mr. Tinker a little while ago three copies of this flow chart. I believe it was included in the appendix of the Commission volume.

[Copy of the flow chart follows:]

Flow Chart of Asylum Decision-Making

Under Proposed Model



Source: J. Scanlan, "Issue Summaries", in Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy And The National Interest, Appendix C, p. 93.

USE OF PROFILES

Mr. SCANLAN. But I think that the chief way to do it—and this relates to something that I believe Professor Martin suggested I think if you establish profiles, first of all, the profiles are on file, and they are constantly being updated.

As a result of that, when you have large-scale influxes from a certain area you are able to look at them, and you do not have to send up a request for every single individual which goes up, gets sat on for a while by BHRHA—in some instances it gets in the file box and sits there for 10 months before anybody does anything with it.

But the officials who are actually processing the asylum applications make reference to the profiles and they do their job and try to determine the credibility of a claim of well-founded fear of persecution, using the profile information plus the statement of the individual that makes the claim.

I want to be very clear about one thing. I think it is very possible that someone for a bizarre reason can be potentially subject to persecution and that his reason for being subject to persecution may not be in any available profile.

He may, for instance, be the grandson of the opposition leader of a political party some place in some country, and he should have the right to make that particular point, whether or not a profile is in existence which generally puts him within a category of people who would be likely to be subject to persecution.

However, in such a case, I think, the burden of proof on him is very clear. He has to demonstrate that he is in fact the grandson of his grandfather, the head of a political party, of the opposition, and that that persecution is likely to go all the way down to his level.

The effect of the profile of course is that in certain instances the process is simplified. Let us say for instance we discovered that all the labor union leaders in a particular country are systematically imprisoned, put in jail. The applicant still has to demonstrate that he is in fact a labor union leader. If that has not been said and done there is no reason to send it up to some other level to make a determination that labor union leaders in this country are being imprisoned, or persecuted, or whatever.

I think there is a lot of time wasted with the present procedure. I think that that waste of time happens at several different levels because it can involve at the present time more than one level in the present proceeding—the District Director, the immigration judge, the Board of Immigration Appeals; very possibly it can involve the courts in a deportation proceeding by an appeal to the U.S. Court of Appeals.

ASYLUM REVIEW DISTINGUISHED FROM DEPORTATION HEARING

Definitely, I think that after the initial determination has been made, the second body that looks at the asylum claim should be the only body that is in most instances at least—perhaps in all—allowed to consider the substantive questions which are raised in the asylum claim.

That does not mean, then, that you can necessarily, for instance, exclude the court of appeals from looking at other factors having to do with the deportation of an individual.

But I think it does mean that if you have an appropriate asylum review body that makes sure that the initial asylum determiner did his job properly, that the court of appeals does not have to have before it as an issue the substantive questions that were raised before the Asylum Review Board.

Let us say, for instance, that the only thing that stands between an individual who enters the United States and deportation is a political asylum claim. That person can be initially interviewed for all of the regular immigration purposes, fingerprinted, biographical data provided. Let us say he does not get any preference category, he enters without papers.

You can go right into deportation proceedings. You can issue an order of deportation. If he has an appeal to the court of appeals on the deportation finding, then he goes to that court if he has any grounds to do so.

Meanwhile, in a parallel process, you deal with the asylum claim and you go with the one review. If the one review is completed before the deportation proceeding is completed, then by the time the deportation proceeding is completed the asylum claim possibilities are exhausted.

If it takes a little bit longer, then you do not actually deport the person until the asylum review is completed, but you still do not give the asylum review question to the court of appeals.

I think that provides quite a bit of efficiency in the process.

Senator SIMPSON. Thank you.

Professor Martin, in your experience, where within the asylum adjudication structure would you say you perceive the most delay, and where do you believe the most effectiveness is in that proceeding?

Mr. MARTIN. Well, the delay can come in in a great many points now. Certainly, with understaffed agencies involved at every stage, it takes a while to get around to cases even without problems like lost files.

One delay that I think has been particularly debilitating, though, has been the availability of interlocutory review of procedures in the judicial system. I would favor, except in emergencies, preserving judicial review. But I think that should be available only on one clear line of direct review after there has been a final determination within the administrative system of whether the person is entitled to asylum or not.

Senator SIMPSON. Let me ask Professor Boswell, do you think that the asylum adjudication procedures have broken down solely on the basis of the numbers, that if the numbers were fewer, what changes might we suggest in the procedure? If you could give us your comment on that, on the administration-proposed asylum procedures?

Mr. BOSWELL. Well, first I think part of the problem is numbers, and I do not foresee that this problem will exist between now and eternity. That is why I recommend we look at them in two different ways, one the mass applications and individualized cases.

The place where I see most of the problems appearing is the time between when the application is filed and the time the recommendation comes back from the Department of State because of the time that it takes the Immigration Service to take hold of that application, to do something, to interview the person, and then 7 months after the application was filed, forward it back to the Department of State. Then the Department of State takes its own time which usually is a substantial period of time.

The lesser period of time occurs during the period of judicial review. If that could be limited to only 1 year or 6 months, whatever it might be.

In a frivolous case, the Government can then move that it be summarily affirmed.

With respect to the administration's proposals on asylum, the way that I view the procedures that they have proposed, first is the asylum officer. I think that is a very good idea except that I am concerned that when you truncate the judicial review procedure, when you eliminate further administrative review before the Board of Immigration Appeals, or with an independent immigration judge, that you are putting so much responsibility in the hands of the asylum officer that it is almost like giving that asylum officer the ax that he can use—which she can use—to put an end to that particular individual.

I am not saying that the asylum officer is not going to act responsibly. It is a tremendous responsibility and a bad, bad decision could be death for that individual. The only remedy that will be left is judicial review which will be in terms of whether there has been an abuse of discretion.

That is a very hard burden to overcome on the part of the alien who is making application for asylum. I think that there would be very few bona fide cases that would be overturned in a court of law. There are very few cases now that are overturned in court.

I am very concerned about that, and that is why I was pointing out this judicial review problem.

Senator SIMPSON. Judge Milhollan, under the administration's proposal as we heard it expressed, the Board of Immigration Appeals is to be effectively eliminated as a review mechanism.

Do you feel that such an elimination would actually save time, expedite the process? What are your thoughts on that?

Mr. MILHOLLAN. Well, sir, as you know, our involvement, our jurisdiction over asylum claims in exclusion proceedings has been a rather recent development, we did not previously have that jurisdiction.

I can certainly sympathize with the administration's position of trying to eliminate some time. But I think that the various comments that have been made would suggest that the delays in the entire process are really not with the Board of Immigration Appeals.

We make an effort, a strong effort, to keep up with our caseload, as difficult as that may be from time to time. We adjudicate cases expeditiously.

So, I do not think we are talking about a large delay with the Board unless, of course, you get into the perhaps thousands of appeals, then you are going to need a special body.

Senator SIMPSON. Do you feel that there are ways in which the Board's unique experience can be brought to bear on shortening the asylum due process?

Mr. MILHOLLAN. I think so. We have, as I indicated, adjudicated many Cuban cases to date. We received considerable cooperation from attorneys representing those Cubans. One attorney in particular came to us with 92 cases which she wanted to argue. She isolated the issues that she wanted to discuss, presented the issues to the appellate trial attorneys for the service, and in the course of 3 days they came in and argued the issues to us, and told us what issues were relevant to which cases.

Well, this enabled us to address issues and perhaps decide a number of cases much more rapidly than we would otherwise have been able to. That type of cooperation is significant and enables us to adjudicate the cases more rapidly.

Senator SIMPSON. That is almost like a pretrial procedure under the Federal rules.

Mr. MILHOLLAN. Right.

Senator SIMPSON. I guess for some reason—and I do not know that we really want to know—the Board of Immigration Judges, for some reason they have escaped the coverage under the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedures, and the administrative practices—it is fascinating.

That is an interesting thing for the staff to pursue.

But maybe a pretrial procedure might be a very effective method to pursue. That is interesting.

Mr. MILHOLLAN. That is what I am here for.

Senator SIMPSON. Yes. We need somebody to do that.

One other thing, do you think we should restrict the pleading of asylum exclusion from deportation proceedings?

Mr. MILHOLLAN. I am sorry, restrict it to those proceedings?

Senator SIMPSON. Restrict the pleading of asylum at exclusion or deportation proceedings. Did I say that correctly?

Mr. MILHOLLAN. To that type of proceeding? I am sorry.

Senator SIMPSON. Well, that is used sometimes as a defense. The pleading of asylum is used as a defense in exclusion or deportation proceedings. Do you think that should be, or should we eliminate that?

Mr. MILHOLLAN. I do not think it should be eliminated.

Senator SIMPSON. We would not eliminate it, we would restrict it. Perhaps to plead it within 14 days after entry.

Mr. MILHOLLAN. Somewhere along the line—and I am not sure I understand the question totally—somewhere along the line somebody has to have that opportunity to make that pleading. Now, you are suggesting that it is a defensive mechanism.

Senator SIMPSON. It has been referred to as a defense.

Mr. MILHOLLAN. I am sure in some cases it is, but I would hesitate to say that is always true. Somebody may be submitting a very valid claim for asylum, and they ought to have the opportunity in some type of procedure. I am sorry, I may not—

Senator SIMPSON. No, I may not be providing it properly for you, restricting it in some way.

Mr. MARTIN. If I could address that. I have not seen the precise proposals along those lines, but I have heard for a while that there

may be a proposal to require that any asylum claim be filed within a limited period after the applicant's arrival—perhaps 14 days.

It may be that some of that is based on a misreading of part of the provisions of the United Nations Convention. There is article 31 of the convention that deals with refugees who are unlawfully in the country of refuge. It provides, first of all, that penalties shall not be visited on those people if they promptly present themselves to the authorities.

Now, it may be that the thought is that, well, people who do not promptly present themselves to the authorities are therefore outside the protection of the convention and we do not even have to entertain their asylum applications.

I do not know that this is the thinking behind those proposals, but I want to say that the convention does not allow that kind of harsh response. It may be possible to impose certain penalties if a person does not present himself promptly, but there is another provision in the convention, article 33, that prevents return to a country of persecution. That applies even if somebody is very tardy.

I can understand the feeling that we want people to file their claims promptly and I think if someone does not, that failure could be evidence against the asylum claim. But I think that precluding, absolutely precluding the filing of a claim after a certain period, is a penalty beyond what the convention allows.

Senator SIMPSON. Let me ask you, prior to concluding here because we have discussed due process, your comments about due process.

Would any of you care to respond if you perceive a difference between the rights that one can attain who is not permitted legal entry to the United States of America, and one who is legally in the country?

The question, I guess, is phrased to determine whether we need to accord the asylee applicant held at the point of entry with every single one of our constitutional rights as citizens of the United States.

That is not being said in an inflammatory way, but I would be very interested in an answer from people who are interested in constitutional law and human rights.

Mr. BOSWELL. I might share my views on that.

I sincerely believe that asylum should be set apart from other areas in the immigration law. We are talking about somebody who is arguably in fear of their life, not that they are coming here necessarily to work; but they will have to prove their case at some point. That they are in fear of what might happen to them in the event that they are returned to their own country.

I think that we have to look at it in those terms, and then give them every opportunity to make their case heard on those points of persecution. If they cannot show it, and if they cannot show it within the time period that is imposed by law, then I can see where they may be required to leave the United States.

But I think that we should really look at this differently from our looking at nonimmigrant visas, treating investors, intracompany transferees. This is a very, very serious decision that is being made by the U.S. Government and by the individual making the application.

Senator SIMPSON. Well, I will have some other questions and I will submit those to you in writing. Other members of the committee will have questions and we will submit those to you.

I very much appreciate your help and assistance as we plow ahead in this venture.

The next hearing of the subcommittee is on Friday on the issue adjudication, as we continue that.

Thank you very much for your comments, I appreciate your being here.

With that, the hearing is concluded. Thank you.

[Whereupon, at 4.15 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

ASYLUM ADJUDICATION

FRIDAY, OCTOBER 16, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:34 a.m., in room 412, Russell Senate Office Building, Hon. Alan K. Simpson (chairman of the subcommittee) presiding.

Staff present: Richard W. Day, counsel to the subcommittee.

Also present: Richard W. Day, counsel to the subcommittee.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, A U.S. SENATOR FROM THE STATE OF WYOMING, CHAIRMAN, SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY

Senator SIMPSON. Since deathly quiet has set upon the room, we might just as well start.

Good morning. This is the second in a series of adjudication procedures, again a very technical area, not too dramatic, in my view, or exciting, but very necessary that we look at because we are concerned with two technical but critical aspects of our immigration. We are concerned with adjudication, first those initiated outside of the INS, such as requests for suspensions or deportations, exemptions and preferences in the issuance of nonimmigrant and immigrant visas, extensions of time, requests for voluntary departure, and requests for adjustment of status. And then we are concerned with those initiated by the INS designed to remove an alien from the country, such as deportation and exclusion proceedings, and those which impose various civil and criminal penalties.

The number of actions with which we are concerned and with which the agency is concerned, is so complex, there has evolved, I think, a most arcane and complex adjudication structure with actions taking place at various levels within the INS, the State Department, or the Labor Department, without much rhyme or reason. We are going to look at that closely. I think an example is in the case of those persons seeking first and second preference determinations, or advance permission to enter the country, or those having fines imposed upon them. Those determinations are made by the District Director, and appeals are then made to the Board of Immigration Appeals. And yet, with respect to third and sixth preference petitions and orphan petitions, again, the determinations are initially made by the District Director, but the appeal is then made to the Regional Director. That is an interesting anomaly.

Certainly complexity in itself perhaps is no great fault, or else this whole institution here would perish in its own corporeal fat. But when it leads to continued confusion and to delay and to inefficiency, then it is indeed the Congress concern. We perceive that there is a genuine desire among those interested in the administration of the program, and those outside, to see that increased efficiency is attained. We are here to do all that we can as a Congress to assist in that.

This hearing serves to complement the asylum adjudication hearing which we had on Wednesday. It also directs us to some of the temporary worker adjudication questions which will come before us in a full hearing on October 22.

But our focus today is primarily on institutions. We want to observe the status of the immigration judges, the types of issues they address, their status within the Service, their relation to other programs and missions of the Service. We want to also look at the status of the Board of Immigration Appeals, its establishment, its function, and whether over the long haul it should be revised or changed or altered or dispatched, as some have said, with appeals being made directly to the circuit court of appeals, or whether it should be modeled after the Parole Commission or an administrative agency within the Department of Justice or as suggested by the Select Commission, whether it ought to become a title I court.

We will examine into those things, and the role of the Attorney General in the adjudication structures, how has he exercised his discretion, how has he delegated it, and other questions that we shall pursue this morning.

So, with that, we will proceed with the administration panel and welcome Doris Meissner, whom we have seen before, before our panel, the Acting Commissioner of the Immigration and Naturalization Service; and Aaron Bodin of the Department of Labor, and again, sir, welcome back; Mr. Milhollan, David Milhollan, Chief Judge and Chairman of the Board of Immigration Appeals.

And you do know of the time requirements. Mr. Richard W. Day, Esq., Counsel, will operate the machinery.

So if you will please proceed.

STATEMENT OF MS. DORIS MEISSNER, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE

Ms. MEISSNER. Thank you, Mr. Chairman.

With your permission we will enter our statement into the record and make a view brief opening remarks.

Senator SIMPSON. Without objection.

Ms. MEISSNER. As you know, the present structure of the immigration administrative hearing process resides within the Immigration and Naturalization Service and is carried out through special inquiry officers who are also known as immigration judges. The special inquiry officers are responsible to a chief immigration judge who is responsible to the Commissioner of the Immigration and Naturalization Service.

The special inquiry officers are civil service employees who compete for their positions. They are mostly people who have formerly served as trial attorneys within the Immigration Service and there-

fore come from the prosecution side, as it were, and step into the role of immigration judges.

Appeals of the judges' decisions are of course made to the Board of Immigration Appeals which exists under regulations that the Attorney General has promulgated.

The administration believes that the structure of the immigration judiciary at the present time is not satisfactory, and we would propose to change it after having reviewed several different options.

The first option that we looked at was how the status quo might be improved. We will improve the status quo regardless of what happens in the area of new formulations, because we will have to live with the present situation for the time being.

There are a number of things that can be done to improve the present structure. First of all, we would hope very soon to appoint a permanent Chief Immigration Judge. We have been operating under an Acting Chief Immigration Judge for some time, and that situation needs to be regularized.

We will be working on the whole issue of the independence of the immigration judiciary within the INS to be certain that independence is in fact assured consistent with accountability and that other kinds of quality and performance factors are maintained in order to have a credible judiciary.

But whatever we do to improve the status quo, an inherent conflict persists in the present situation. That conflict, of course, is that the judiciary is, when all is said and done, part of the Immigration Service, and that means the Immigration Service is both the prosecutor and judiciary. We believe that as long as that conflict exists, the situation will not be the best formulation possible.

Therefore, the other options must be considered.

The second option we reviewed was one that the Select Commission recommended, which is the creation of an article I court. An article I court is very attractive in that it clearly puts into place a situation where independence cannot be questioned. It is also attractive because it removes one level of appeal, and that is important with regard to immigration proceedings.

However, the administration has not endorsed the article I court proposal because there are serious disadvantages as well. The problem of specialized courts is a problem that is well known in the area of court administration, and the Justice Department as well as the administration feels that it is not useful to set up additional specialized courts. Moreover, an article I court would clearly be a rather expensive route to travel at this time, and it is unclear that an article I court would not become encrusted with a whole range of procedures which might inhibit the overall effort of streamlining and timeliness that we are trying to achieve in this area.

The third option we received is one that is attractive to us and that we will pursue, and that is establishing the immigration judiciary as an independent body within the Justice Department, and making the Board of Immigration Appeals a statutory board in order to address the issue of independence. The model for this is the Parole Commission and the way that it presently exists within the Justice Department. We believe that that is the route to go and that is the proposal that we would seek to implement at this time.

That ends my summary remarks, and we are available for questions, Mr. Chairman.

[The prepared statement of Ms. Meissner and answers to questions from Senator Simpson follow:]

PREPARED STATEMENT OF DORIS M. MEISSNER

I am pleased to be before the Subcommittee to testify regarding administrative immigration proceedings before immigration judges and the Board of Immigration Appeals. I will confine most of my remarks to the immigration judge process, since the Chairman of the Board of Immigration Appeals will be testifying concerning BIA procedures.

The Immigration and Nationality Act provides that an applicant for admission to the United States who does not appear to be clearly and without a doubt entitled to enter the country shall be detained for further inquiry before a special inquiry officer. Any person who has already entered the United States and who appears to be a deportable alien under the Act may be held for proceedings before a special inquiry officer so that his deportability may be determined. The term "immigration judge" is synonymous with "special inquiry officer," and the two designations may be used interchangeably.

Immigration judge positions are competitive Civil Service positions. Applicants are selected for immigration judge positions either through an Office of Personnel Management certificate of eligibles or from the Service Merit Staffing Plan. Because of the requirements of the position, most immigration judges are former INS attorneys.

Although immigration judges have their offices in various district offices around the country, they are not under the direction and control of the INS district directors of those offices. They are professionally responsible only to the Acting Chief Immigration Judge. Scheduling, travel, and other administrative matters are handled through the regional commissioners. Secretarial and other support services for the immigration judges have been a problem in the past. In order to increase support services, former Acting Commissioner David

Crosland made the regional commissioners directly responsible for providing secretarial staffing. Although the situation has improved somewhat, this remains a problem.

At exclusion and deportation proceedings, the subject of the proceeding has the statutory privilege of being represented (at no expense to the Government) by counsel of his own choice, if his counsel is authorized by regulation to practice in such proceedings. The Government is generally represented by a trial attorney.

In conducting these proceedings, the immigration judge has the authority to administer oaths, present and receive evidence, interrogate, examine, and cross-examine the subject of the proceeding or witnesses, and to make a determination regarding whether the person is an alien and is excludable or deportable from the United States. This determination must be made only upon the record made at the proceeding before the immigration judge. No immigration judge may conduct an exclusion or deportation proceeding in any case in which he has participated in investigating or prosecuting functions. The regulations provide that at the exclusion proceeding, the immigration judge may, in addition to determining excludability, adjudicate renewed applications for adjustment of status and applications for asylum and temporary withholding of deportation on the basis of a claim of persecution. Similarly, in deportation proceedings, the immigration judge may adjudicate applications for discretionary relief, including adjustment of status, temporary withholding of deportation on the basis of claim of persecution, suspension of deportation, and voluntary departure. In a contested case, the decision of the immigration judge must include a discussion of the evidence and his findings as to excludability or deportability. A similar discussion is required regarding decisions on applications.

The Immigration and Nationality Act provides for an appeal to the Attorney General from an adverse decision in an exclusion proceeding. By regulation, either party may appeal an adverse decision in a deportation proceeding. The Attorney General by regulation has constituted the Board of Immigration Appeals to adjudicate these and other appeals from decisions of immigration officers.

The Board of Immigration Appeals consists of a chairman and four other board members appointed by the Attorney General who serve at his discretion. The Board hears oral argument by request in any case over which it has jurisdiction except in an appeal from a denial of a motion to reopen or reconsider or of a stay of deportation by an immigration judge unless the Board specifically directs that oral argument be presented.

Decisions of the Board are in writing and are binding on all officers and employees of the Service unless they are modified or overruled by the Board or the Attorney General, and certain decisions designated by the Board serve as precedents in subsequent cases involving the same issues.

As administrative proceedings, hearings before immigration judges and appeals to the BIA are not subject to all of the formal rules which are applicable to court proceedings, such as, the Federal Rules of Evidence. Decisions of these tribunals must, be based upon reasonable, substantial, and probative evidence.

With regard to the future organization of the quasi-judicial functions of immigration judges and the BIA, three options have been considered. First, we could leave them as they are today. Second, an independent body within the Department of Justice but outside of INS could be created, similar to the Parole Commission. Third, as recommended by the Select Commission, an Article I immigration court could be created.

The second option is most attractive. That option, constituting an independent body within the Department of Justice but outside and independent of INS, would upgrade the status of the administrative immigration tribunal, enhance its independence from INS, give the appellate body statutory authorization, and facilitate the provision of clerical support, while simultaneously avoiding the pitfalls of more formal court proceedings. The Administration opposes the creation of an immigration court. Such an action would run counter to proposed legislation which is designed to streamline a system already bogged down by too much formality and complex procedures.

I will be glad to answer any questions which you may have.

QUESTIONS FROM SENATOR SIMPSON TO DORIS M. MEISSNER

1. Do you think the adjustment of status which takes the most time within the INS could be substantially relieved if we restrict substantially the nonimmigrant adjustments to immigrants?

During Fiscal Year 1980 113,747 cases of adjustment of status to permanent residence were completed by the Service and accounted for 40% of the total budget of approximately 20 million dollars (8 million dollars).

It is estimated that 50% of these adjustment cases involved spouses and children of U. S. citizens and in most instances were routine.

Had adjustment been restricted to the above group, the cost would have dropped to 20% of the total budget or 4 million dollars. A savings of 4 million dollars would have been realized.

The 50% excluded from adjustment would be the visa preference 1 through 7. They would have to obtain a visa from a U. S. consul overseas.

In addition, such an action would estop the drawing action of the adjustment of status statute.

2. Would you comment on the role of the District Director, Regional Director, and Immigration Judges in the adjudication process? Do you think the adjudication process could be substantially simplified?

A District Director has the authority to grant or deny any application or petition submitted to the Service. This is a straightforward process, allowing an applicant to deal with the District office directly. In instances where an interview is necessary, the applicant has access to an office which is usually fairly close-by. In Fiscal Year 1980, the Service processed approximately 1,800,000 application for adjustment of status, reinstatement of status, extension of stay, and change of school. The overwhelming majority of these were adjudicated solely at the District Director level.

A Regional Commissioner has appellate authority to consider a wide range of applications, such as breach of bond, temporary worker petitions, reentry permits, change in nonimmigrant status, and various certificates related to naturalization. They also have authority to consider appeals in third and sixth preference visa petition cases and certain orphan petition cases. As to the latter, the Service is considering removing portions of the appellate jurisdiction from Regional Commissioners to the Board of Immigration Appeals, with the Attorney General's approval.

Immigration Judges hear exclusion and deportation cases, and adjudicate applications for relief available in such proceedings, such as applications for adjustment of status, suspension of deportation, asylum, and withholding of deportation. Immigration Judges also hear cases involving withdrawal of school approval, and rescission of adjustment of status. They have no authority to review any adjudication by a District Director or a Regional Commissioner.

The present division of authority provides for adjudication of applications and petitions without duplication of effort. The limited appeal rights available serve a useful purpose in that they both protect the applicant and insure consistency and accuracy of adjudications.

3. How do you think immigration judges should be selected in the future?

The Special Inquiry officer or Immigration Judge position has grown in importance since its establishment by the 1952 Immigration and Nationality Act. Initially, immigration officers with and without formal legal training were selected and utilized in this position. In recent years, only attorneys have been selected for the position of Immigration Judge. The vast majority of Immigration Judges have come out of prior Immigration and Naturalization Service positions. However, a few have entered after service with the Board of Immi-

gration Appeals and other government agencies. With the spread of immigration law courses in law school curricula nationwide and the broader practice of immigration law in the private sector, we would anticipate that many more applicants from outside government ranks be applying for these Immigration Judge positions.

Applicants for the position of Immigration Judge should be sought from as many sources as possible with additional attention to advertising outside government circles. These individuals should be attorneys and have background in immigration law although they need not be persons who have practiced immigration law on a full time basis. The value should be placed upon general legal knowledge as well as on specific experience in immigration law.

4. What additional support staff do you think is needed for the Immigration Judges?

The current budget amendment to the 1982 budget asks for 34 additional positions and 38 workyears totaling \$1, 203,000 for the network of immigration judges. This includes seven additional clerical personnel and added travel money for use in a variety of locations. It also provides for a complement of nine immigration judges, six docket clerks, nine interpreters, and 12 transcribers to provide hearings for Haitians detained at Fort Allen, Puerto Rico and at other locations.

The Administration plans to submit legislation which would establish and reorganize the Board of Immigration Appeals and the existing Immigration Judge network. If this is done in Fiscal Year 1983, it will require some adjustment of resources and, possibly, the addition of some additional clerical and interpreter resources for the Immigration Judges. It is hoped that the existing complement of Immigration Judges as augmented by the FY 82 Budget Amendment would be sufficient to handle future workloads and that the current backlog of cases -- caused by the substantial burdens of reviewing the status of Iranians in the United States and Haitian exclusion hearings and asylum claims -- will not continue nor be repeated. The proposed legislation to streamline exclusion and asylum procedures for undocumented aliens would go far to lessen some of the ongoing burden for the Immigration Judge network.

5. Do you think the certification to the Attorney General should be abolished?

Under present regulations, there is extremely limited certification of decisions to the Attorney General from the Board of Immigration Appeals. Certification is possible at the director of the Attorney General, the Chairman or a majority of the Board of Immigration Appeals, or the Commissioner of the Service. There is automatic referral to the Attorney General under 8 C.F.R. 292.3(b) when the Board orders the suspension or disbarment of an attorney or representative authorized to practice before the Service and the Board. Certifications number two or less per year. There is probably little reason for automatic referral of disbarment or suspension of practice cases. However, given the limited use of the overall certification procedure there is no reason to believe that abandonment of this procedure would have any effect on the adjudication process in general.

Senator SIMPSON. Thank you very much.
Now, Mr. Bodin please.

**STATEMENT OF AARON BODIN, DIRECTOR OF DIVISION OF
LABOR CERTIFICATION, DEPARTMENT OF LABOR**

Mr. BODIN. Thank you, Mr. Chairman.

I have a very brief explanatory statement concerning labor certification procedures.

The purpose of labor certification under the Immigration and Nationality Act is to protect American workers from being displaced or otherwise adversely affected by foreign nationals who would come to this country to work.

The law requires that aliens seeking third, sixth or nonpreference immigrant status must first secure a clearance or certification from the Labor Department that there are not sufficient, able, willing and qualified U.S. workers available, and that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

A similar certification is required under Immigration and Naturalization Service regulations for the admission of foreign workers who would come to this country for temporary employment. These nonimmigrants are commonly known as H-2's after the subsection of the statute which authorizes their admission.

I will discuss first the procedures for intending immigrants. Regulations in effect since 1977 require a test of the labor market for qualified U.S. workers willing to accept a specific offer of employment. They require an employer seeking labor certification on behalf of an alien to first offer the job to U.S. workers at wages and under working conditions that prevail for that occupation in that area. The employer must recruit both on his own and through the employment service. If the employer has complied with the requirements of the regulations and U.S. workers cannot be found, certification may be granted. If the employer has not complied with the regulations and/or U.S. workers are found to be available, the certifying officer will set forth grounds for denial of the request which the employer may rebut. If the employer is unsuccessful in his rebuttal, certification is denied, and appeal may be made to the Office of Administrative Law Judges in the Department of Labor.

The labor certification program is highly decentralized. Some 35,000 to 45,000 applications are processed annually in some 2,500 local offices of State employment security agencies. These applications are reviewed for completeness and forwarded, usually through State headquarters, to 10 regional offices of the Employment and Training Administration for determination by a departmental certifying officer.

The Department has also established a schedule of occupations and occupational categories for which a test of the labor market is not required. Schedule A of the regulations precertifies aliens who are in occupations determined to be in short supply nationally, who are scientists or artists of exceptional ability, religious workers, or intracompany transferees of multinational corporations. Aliens who meet the qualifying standards set forth in our regulations may

be certified by an Immigration and Naturalization Service officer in this country, or a U.S. consul abroad.

A similar finding as to availability and adverse effect is made by the Labor Department for H-2 temporary workers, but in the form of an advisory opinion to the Immigration and Naturalization Service. Because of the unique characteristics of the agricultural labor market, the Department has promulgated separate regulations for the certification of temporary foreign workers for agricultural and logging occupations. The scheme of these regulations is similar to the one just described for immigrants. Employers must recruit U.S. workers on their own and through the employment service at wages and working conditions designed to prevent an adverse effect. If qualified workers cannot be found, foreign workers may be certified.

There are, however, some significant differences because of the seasonal nature of the work and the migratory nature of much of the traditional work force. For example, employers must provide or pay for the transportation of workers and must provide housing which meets minimal safety and health standards.

The certification procedures for temporary nonagricultural workers require the same H-2 certification, but they are more flexible to accommodate emergency situations and the need for foreign workers across a spectrum of occupations which include soccer players, night club entertainers, and construction workers. In the past several years, the Department has certified for employment an average of some 30,000 temporary agricultural and nonagricultural workers.

Thank you.

That concludes my statement.

Senator SIMPSON. Thank you, sir.

Mr. Milhollan, please.

STATEMENT OF DAVID MILHOLLAN, CHAIRMAN, BOARD OF IMMIGRATION APPEALS

Mr. MILHOLLAN. Thank you, Mr. Chairman. I appreciate the opportunity to be able to testify today.

I have a prepared statement which I would respectfully request be made a part of the record at this time.

As you know, the Board is a specific unit within the Department of Justice, totally separate and distinct from the Immigration and Naturalization Service. It is composed of a Chairman and four Board members, and we have a total staff of 41 employees.

The Board performs the quasi-judicial function of providing in all but a few cases the final administrative remedy for the review of certain decisions of the Service. The Board's role minimizes the extent of Federal court review of decisions of the Service; historically a very small percentage of Board decisions will be appealed into the Federal courts, and an even smaller percentage will be reversed on appeal.

The majority of the appeals to the Board involve orders of deportation. It is important to note, however, that the Board also reviews cases involving exclusion of aliens, and applications for asylums. We also participate in the visa petition area, fines, bonds,

and advance permission to enter. In other words, I think it is significant to recognize that the Board reviews decisions not only of immigration judges but also of district directors.

I have submitted in my prepared statement various figures involving the Board's workload. I would simply briefly point out at this time that while we had been in the custom of receiving approximately 2,500 appeals per year, last year that figure rose to over 2,700, and this past fiscal year, fiscal 1981, the Board docketed 3,800, an increase of over 1,000 from the last fiscal year. The tremendous increase in the number of incoming appeals is attributable to the cases resulting from the Iranian hostage situation and the Cuban flotilla. We have received approximately 650 cases involving Iranian nationals to date. We have also received over 400 exclusion cases involving nationals of Cuba.

In addition, we received during fiscal 1981 in excess of 400 administrative fine appeals in which fines had been assessed against owners of boats who allegedly brought undocumented Cubans to this country.

As you know, the Board presently exists by virtue of regulation and not by statute. Various studies, including a recent report submitted by the Select Commission on Immigration and Refugee Policy, recommend the enactment of statutes creating a statutory board or court. Recent consideration has focused on whether the body should be an article I court, as suggested by the Commission, or an independent statutory body within the Department of Justice similar to that of the Parole Commission. It is difficult to quarrel with the reasoning of the Select Commission and the reasons for their suggestion that an article I court be created. On the other hand, many of the objectives, perhaps most of the objectives, of the Commission could be recognized and realized by the creation simply of a statutory body within the Department of Justice.

I think it is important to recognize that the Board now, for the most part, does act independently within the Justice Department under regulations. It would not, in my view, be difficult to simply create a board by statute within the Department of Justice, and we would and could continue to exist much as we do today.

Now, of course, if there were a change in the jurisdictional functions of the Board, that would have to be considered in setting up any statutory board. But, it nonetheless could be done quite well through the creation of a statutory body in the Department of Justice.

That concludes my statement. I would be pleased to answer questions.

[The prepared statement of Mr. Milhollan follows:]

PREPARED STATEMENT OF DAVID L. MILHOLLAN

Mr. Chairman, Members of the Committee, I appreciate this opportunity to appear before you today to testify regarding the functions of the Board of Immigration Appeals and the discharge of its responsibilities relative to the Immigration and Nationality Act which have been delegated to the Board under Title 8, Code of Federal Regulations, Parts 3 and 292.

As you know, the Board is a specific unit within the Department of Justice, totally separate and distinct from the Immigration and Naturalization Service. The Board is composed of a Chairman and four Board Members. An Executive Assistant/Chief Attorney Examiner who is directly responsible to the Chairman assists in carrying out the Board's responsibilities. He is also available by regulation to serve as an Alternate Board Member when necessary. The Board has a total authorized staff of 41 employees, including an Administrative Officer, 16 attorney examiners, and 18 secretarial and clerical personnel.

The Board performs the quasi-judicial function of providing, in all but a few cases, the final administrative remedy for the review of certain decisions of the Immigration and Naturalization Service. The primary mission of the Board is to carry out the Congressional mandate that the immigration laws receive uniform application throughout the United States. The Board accomplishes this by interpreting provisions of the immigration laws in its decisions and by reconciling inconsistent orders issued by different officers of the Immigration and Naturalization Service regarding either the application of law or policy or the exercise of discretion. The Board's role minimizes the extent of Federal court review of decisions of the Immigration and Naturalization Service. Historically, a small percentage of Board decisions will be appealed into the Federal courts and an even smaller percentage reversed on appeal.

The majority of appeals to the Board involve orders of deportation rendered in formal due process hearings by immigration judges across the nation. The Board also reviews appeals from

orders of immigration judges involving the exclusion of aliens applying for admission to the United States and applications for asylum. Other cases involve appeals from orders of District Directors of the Immigration and Naturalization Service denying visa petitions for immigrant status on behalf of close relatives of United States citizens and permanent resident aliens, and appeals from District Directors' decisions involving administrative fines. In addition, the Board interprets the immigration laws and establishes guidelines for the exercise of the Attorney General's discretion in connection with various forms of relief from deportation. These include applications for adjustment of status, suspension of deportation and voluntary departure. The Board also has authority, with the approval of the Attorney General, to prescribe rules governing proceedings before it, and to regulate the conduct of -- and disbar or suspend for cause -- attorneys, accredited representatives of recognized organizations and others who appear in a representative capacity before the Board and the Service.

Finally, the Board renders decisions on applications by organizations and individuals for recognition and accreditation seeking to practice before the Board and the Service. In fiscal year 1981, the Board acted on 34 applications for recognition by organizations and 53 applications for accreditation by individuals desiring to represent others before the Board and the Service.

Over the past few years the number of appeals arriving at the Board gradually increased. We had been receiving in the neighborhood of 2,500 cases per year, which increased to 2,780 in fiscal year 1980. However, in fiscal year 1981, the Board docketed 3,822 cases, an increase of 1,042 over fiscal year 1980. In this same period it rendered decisions in 3,289 cases, an increase of 527 over fiscal year 1980. Oral arguments were heard in 249 cases at the request of one of the parties, usually the alien respondent in deportation proceedings or the applicant in exclusion proceedings or the petitioner in visa petition proceedings.

The tremendous increase in the number of incoming appeals is attributable to cases resulting from the Iranian hostage situation and the Cuban flotilla. We received approximately 650 cases involving Iranian nationals, most of which were deportation proceedings concerning Iranian students. We also received over 400 exclusion cases involving nationals of Cuba who arrived during the flotilla. Asylum was one of the issues prevalent in all the cases. In addition, we received during fiscal year 1981 in excess of 400 administrative fine appeals, in which fines had been assessed against owners of boats for allegedly bringing to the United States undocumented Cubans. While we are no longer receiving a large number of Cuban exclusion cases, the fine appeals and cases involving Iranians continue to arrive at the Board.

As you know, the Board presently exists by virtue of regulations found in Title 8 of the Code of Federal Regulations, and not by statute. Various studies of immigration matters conducted over the past few years, including the recent report submitted by the Select Commission on Immigration and Refugee Policy, recommend the enactment of statutes creating a statutory Board or Court. Recent consideration has focused on whether the body should be an Article I court as suggested by the Select Commission or an independent statutory body within the Department of Justice, similar to that of the Parole Commission. The Select Commission has stated its valid and substantial reasons for its conclusion, and they need not be reiterated here. It should, however, be recognized that many of the objectives of the Commission can be accomplished through the creation of a statutory body within the Department of Justice at a substantial saving in budgetary requirements.

I would be pleased to answer any questions you may have.

Senator SIMPSON. At present, there are at least three organizations within the INS, the Association of Border Enforcement Officers, District Directors, and others, your association.

Why do we require that number in the INS? Why is that? Anyone? Doris?

Ms. MEISSNER. We do not require that number of associations. Obviously, since there are different kinds of occupational groups and therefore different interests within the Immigration Service, it is somewhat natural that people combine forces in order to exchange points of view and so on. But I do think it is fair to say that the development of these various associations as formal mechanisms within the Immigration Service is unfortunate, and something that we do not believe is healthy overall for future development. In my view, development of these groups results from a lack of internal communication and a sense on the part of certain groups of employees that their viewpoints will be responsibly considered. Therefore, they have formed various associations as a way of registering sometimes very legitimate concerns and opinions.

Nevertheless, we have not had a difficult time working with these associations. The purpose of the associations is to try to better the Service overall, and that, of course, is in everyone's interests.

But I do believe that if we are successful over the next several years in bringing about some very dramatic improvements within the Immigration Service, that the need for these associations and the needs of various professionals have that kind of affinity will probably diminish.

Senator SIMPSON. As soon as the corrective measures are taken and we have the INS back as a very productive organization, those things will take place automatically you feel.

Ms. MEISSNER. Yes, I believe so.

Senator SIMPSON. How will the relationship between the adjudication officials and the enforcement officials of the INS be bettered?

Ms. MEISSNER. When you use the term "adjudication," I think you may be using it in a way different from our use. Let me first clarify the term.

Senator SIMPSON. Sure, go ahead.

Ms. MEISSNER. When we speak of adjudication in INS, we are talking about an administrative decision made by an examiner in a district office that gives a benefit to an alien. I think when you are talking about an adjudication, you refer to a more formal kind of decision made by an immigration judge. Is that correct?

Senator SIMPSON. That would be the way I view it, yes.

Ms. MEISSNER. In terms of the relationship between district directors, for instance, and SIO's—immigration judges—there is, of course, an inherent tension because the judge exists for the purpose of reviewing, as necessary, the decisions of a district director. So you have the traditional tension that exists between the judiciary and the Government, in microcosm.

I do not think, however, that the tension is destructive. There needs to be a review process, and if the immigration judge were not performing that review, it would have to be performed in some other fashion.

It is true, however, that there is discussion from time to time as to whether particular kinds of reviews should be granted to the immigration judge. To what extent might that remove discretion from the district director? While there is room for that argument, the overall review function that the immigration judges perform is one that is readily acceptable.

Senator SIMPSON. I appreciate hearing that.

What do you envision as being the proper relationship that might be established between, if all things were in optimum order, between the immigration judge and the Board of Immigration Appeals?

And I will ask that, too, of you.

Ms. MEISSNER. The proposal that the administration is making to remove the immigration judges from the Immigration Service and establish them as an independent body within the Justice Department addresses the concern that the relationship as it presently exists is not the most constructive relationship. Were the immigration judges to exist within the Justice Department, there would clearly be a linkage, an administrative linkage between the immigration judges and the Board of Immigration Appeals. One has to have some kind of an administrative structure, and the most likely formulation would be to have the immigration judges function as the trial level of the court system, the BIA becoming the statutory function there as the appellate level of the judiciary system.

Senator SIMPSON. I would like your response to that, please, Mr. Milhollan.

Mr. MILHOLLAN. The relationship between the judges and the Board in the past has simply been one of reviewing the decisions of the immigration judges from their basically trial level, and presumably in any system that were adopted, that particular function and relationship would continue.

Now, so far as the other aspect, the administrative relationship, obviously it depends on what type of an administrative setup was created. I can, for example, foresee the desirability of more or less two separate units within a court system, within the Department of Justice, the Board of Immigration Appeals being one, on an appellate level, and the immigration judges on another level.

At the present time it is, I think, significant to recognize that the Board does provide its own administrative and support help. We have an administrative staff. We have all of our support staff. We have a staff of law clerks that work for us. We do function independently, and we could continue that way, even if created by statute tomorrow. Our system would not change that much. That is not true of the immigration judges who are, of course, part of the Immigration Service. All of their support help, all of their administrative help in the way of budgetary, personnel help, all of that is provided by the Immigration Service, and if they are removed from the Service, which appears to be very desirable, all of that is going to have to be provided for them. They are going to need space to sit, they will need their desks. They are going to need typists. They are going to need administrative support help of some kind.

Now, administratively we are not equipped, that is, the Board is simply not equipped at this point to administer the judges in all of the administrative functions that would be created by separating

them from the Immigration Service. There are still, then, the budgetary matters that will have to be addressed for the judges and personnel help. The Board cannot do that with our present personnel.

In other words, you are talking about not simply removing judges from a body and putting them into another body; you are talking about some very significant administrative problems that I am not sure anybody has addressed yet, which are going to have to be addressed. The relationship between the judges and the Board would obviously depend on exactly how that administrative procedure was set up.

Senator SIMPSON. Mr. Bodin, what is the distinction between the Labor certification procedure with respect to immigrants, third and sixth preference immigrants, and nonimmigrants, the H-2 workers that you described?

Mr. BODIN. For third, sixth, and nonpreference immigrants, the Secretary of Labor has statutory authority to make a determination which includes very specific language with respect to the finding he must make to determine whether U.S. workers are available; namely, they must be qualified, able, and willing. The word "willing" has been interpreted by the courts to require the Labor Department to monitor recruitment efforts of employers to determine whether there is a specific worker willing to accept the offer of employment.

For H-2 temporary workers, we have no direct statutory authority but operate under regulations of the Immigration and Naturalization Service, which require us to determine whether qualified U.S. workers are available. We are not required in the H-2 certification process, therefore, to monitor the recruitment efforts of employers to determine whether U.S. workers are willing to accept a specific job offer.

Senator SIMPSON. Are there any methods to link up the INS and the Labor Department adjudication?

Mr. BODIN. The role of the Labor Department is very limited and specifically geared to the protection of U.S. workers. Our certifying officers are in almost daily contact with the District Directors of the Service, and we coordinate activities very closely at the national level.

With respect to the paper flow and other issues between the agencies, I frankly do not see how we could operate more closely together without getting in each other's hair.

Senator SIMPSON. You would not get in my hair. [General laughter.]

One of the things that has been puzzling me as we look at the Labor Department certification procedures, and you know, obviously the Labor Department considers those very important, and American labor considers them very important, and yet, let's say, in working in its finest fashion, we then come to family reunification procedures and some of the preferences that come in under that, or the categories that come in under that, of which there is no certification process whatsoever.

What is your thought on that? Does that need to be—do we need to revise the definition of nuclear family—I know this is out of your scope, but I am going to ask it anyway—so that we have a clear idea of family reunification as we like to think of it, in other

words, spouses and minor children I think is what the American people think of in family unification. That is not quite what we do here. We have brothers and sisters and adults and parents and all of them coming in, and in many cases quite able to work and do work, and they are not at all under the influence of any Labor certification or H-2 program or anything else.

Mr. BODIN. I think that there would be a conflict of objectives if, on the one hand, it was a goal of the immigration law to allow for family reunification and then to condition that on a test of whether U.S. workers would be adversely affected if that family reunification were to occur.

Senator SIMPSON. Well, let's say not that immediate family reunification, but down into the expanded nuclear family of brothers and sisters.

Mr. BODIN. That is a policy question really beyond my purview. I think in pure economic theory, every time you add to the labor force you are at least initially putting U.S. workers at a competitive disadvantage, but I do not believe that the numbers involved are particularly significant in that respect.

Senator SIMPSON. Certainly it dilutes what certification is trying to do.

Mr. BODIN. That is true, the certification procedure screens only a small number of immigrants that come to this country and work.

Senator SIMPSON. I think that American labor and the American people think that the labor certification process is much larger in scope than it actually is. It is a very small part of the process.

That is correct, is it not?

Mr. BODIN. Yes, sir.

Senator SIMPSON. What is the percentage that are screened for Labor certification as to general, broad categories, or percentage?

Mr. BODIN. Considering that about half of the third, sixth, and nonpreference immigrants, and nonpreference numbers have been unavailable for some time, but the immigrants who require Labor certifications use the available visa numbers under the preference categories, and share those with family members. We would consider that perhaps only about 25,000 or 30,000 Labor certified immigrants are entering the labor force each year. That is probably between 5 and 10 percent of the immigrants who do enter the labor force each year.

Senator SIMPSON. Five—

Mr. BODIN. Five to ten percent.

Senator SIMPSON. Just, quickly back to the H-2 program, how many were admitted into the United States under H-2 numbers last year?

Mr. BODIN. Roughly 43,000. Excuse me, 43,000 aliens were certified to enter. Whether they actually entered or not the Labor Department does not know.

Senator SIMPSON. And that has increased greatly in past years, has it not?

Mr. BODIN. There has been an increase in recent years, yes, sir.

Senator SIMPSON. And yet under the original impetus behind the H-2 program, they were thinking originally of greater numbers coming in, were they not?

Mr. BODIN. Are you referring to the Select Commission?

Senator SIMPSON. Not the Select Commission but the administration or the agency. When H-2 was first implemented it was thought, well, how many will we bring in.

Mr. BODIN. I am not familiar with the legislative history, and I do not know what numbers were contemplated. The process, however, is open ended. There is no quota or limit to the number of certifications that may be issued. The Department makes determinations on any application that is submitted.

Senator SIMPSON. Well, it is my understanding from the legislative history that it was a much larger figure than that that was first thought to be appropriate under H-2, and now, of course, H-2 is going to come up for separate review as we get into possible temporary worker or guest worker programs and see where we go there.

Let me just ask one other question.

What occupations in short supply are now on your list?

Mr. BODIN. On schedule A of the current regulations we have physical therapists, nurses, physicians and surgeons, if their intended employment will be in medically underserved areas, as determined by the Department of Health and Human Services; but only those doctors who would work in medically underserved areas. Those three specific occupations.

Senator SIMPSON. A rather tough list to fill, perhaps.

You are smiling.

Senator Grassley of Iowa, who certainly has been very interested in this entire procedure and has been a very productive member of the subcommittee.

Do you have any questions?

Senator GRASSLEY. Before I ask questions related to this specific hearing, Mrs. Meissner, there was something I wanted to ask you a couple of days ago when you were here, and it is in regard to a progress report. A radio show I heard you on in March in Iowa on national public radio, in which you were to the best of my recollection, going through some of the problems with INS, at that particular time you said one of the major problems was just a lot of administrative complications, for instance, computer problems, classification problems, lack of uniformity from regional office to regional office and some of those things, and I would just like to ask if there has been any progress on those problems in the last 6 months or so, or movement toward progress.

Ms. MEISSNER. We have taken a range of steps to try to chip away at that whole series of problems.

Senator GRASSLEY. It dealt with the backlog.

Ms. MEISSNER. Exactly. We are doing some fairly dramatic things in this fiscal year to streamline our procedures within district offices to bring about much greater uniformity between regions, the decisions they make, and the way in which they administer the offices under their control.

I would be pleased to provide you separately a more detailed listing of the kinds of measures that are under way.

Senator GRASSLEY. OK. I think that was just when you started out as Acting Commissioner?

Ms. MEISSNER. That is right. I do not want to take responsibility for a whole series of reforms because obviously these are long term

and need to await the appointment of a permanent commissioner. But there are a number of ameliorative steps that have been taken which we can certainly fill you in on.

Senator GRASSLEY. I would appreciate that.

Mr. Bodin, on the subject of temporary workers, an article appeared in the paper probably 2 or 3 weeks ago which stated that there was no need for a temporary worker program in this country, that we do not have enough jobs as it is to go around. Our subcommittee has heard this statement and claim often, and I would just like to know what your perceptions are of that claim.

Mr. BODIN. Well, the law allows for the admission of temporary workers, and we have established procedures for the labor clearance of such workers which we believe adequately protect the interests of U.S. workers.

So I would say the fact that we have certified for the employment of some 43,000 aliens last year indicates that those jobs could not be filled by qualified U.S. workers.

Senator GRASSLEY. I do not remember whether the article was relating to that or to the experimental program that the administration is suggesting, as in the guest worker program.

Would your comments be equally applicable to that as to the more ongoing, long term program you just spoke of?

Mr. BODIN. I understand there will be hearings on that program specifically, and I would rather not speculate as to how that program would operate. There would be procedural differences between the two.

Senator GRASSLEY. What about just the general proposition of whether there are or are not jobs?

Mr. BODIN. I have heard conflicting evidence on that question. There is obviously a high unemployment rate in the country. On the other hand, we know that there are many jobs that go unfilled.

Senator GRASSLEY. Well, maybe the point is that your department has not reached a policy or negotiations within the administration on that particular point of view that you are incapable of speaking to it?

Mr. BODIN. I am not sure that deliberations within the administration have been completed on that program, yes, sir.

Senator GRASSLEY. Mr. Milhollan, how do you expect the administration's proposal, to establish a new corps of INS asylum officers, to affect your caseload?

Mr. MILHOLLAN. It would reduce our caseload. As I indicated in my opening remarks, during the past fiscal year we received just slightly in excess of 400 cases which dealt with the Cuban nationals who came over on the flotilla, and each case presented an asylum issue. Those cases, of course, would not have come to the Board itself had the administration's proposals been in process.

In addition, there are, according to the testimony the other day that I heard, a tremendous number of asylum claims pending which at this point have not been adjudicated on a lower level, and obviously a certain percentage of those, perhaps a large percentage, would be coming to the Board. Quite factually, there is no way the Board could handle a substantial increase of cases coming to the Board. So it would enable the Board to continue to function and

adjudicate the cases that we have been adjudicating without getting into the asylum area.

Senator GRASSLEY. Undoubtedly the Haitian exclusion cases will come before the Board of Immigration Appeals.

Do you have any idea when the bulk of those cases will come up, and do you have any way of knowing how many you would be hearing, or do you have any anticipation of that number?

Mr. MILHOLLAN. I cannot give you accurate figures. I frankly attempted to try to find that out myself so we could do some planning in that regard. There is an indication that many of those cases would be appealed to the Board for one reason or another.

At this point, of course, the immigration judges have not been able to proceed with the cases because of temporary restraining orders that have been issued by Federal courts. So we are still somewhere down the line. The cases have not been tried by the judges at this point, and I do not know exactly how many cases will be tried. Perhaps the Immigration Service could indicate that. I cannot tell you.

And then there, of course, is always the speculation on exactly how many of those cases that are tried would in fact be appealed to the Board. We have to, I think, anticipate, though, perhaps a large number.

Senator GRASSLEY. And a growing percentage? I mean, based upon the recent years' history, that is just about the normal—everybody is going to do everything they can to exhaust every remedy, plus get adequate encouragement from people within this country to exhaust every remedy?

Mr. MILHOLLAN. We would have to expect that and anticipate that.

Senator GRASSLEY. What can be done to increase the uniformity in interpreting immigration law from district to district so that aliens can transfer locations without going through a status change?

I suppose Ms. Meissner as well as Mr. Milhollan.

Ms. MEISSNER. Change location without going through a status change? You mean change geographical location within the United States?

Senator GRASSLEY. Yes.

Ms. MEISSNER. I am not certain what you are referring to. Perhaps you are referring to the fact that the files that we keep on aliens are located geographically in the city or the district where they first apply for a benefit. When aliens move and change districts, the question of the file following is sometimes a problem. But that is a technical problem of conveying file information. It is not an adjudicative decision that is made on the part of the Service.

Senator GRASSLEY. But to get that, is it not necessary to have a change in the status of the applicant?

Ms. MEISSNER. Not a formal status change in the way that we interpret that term. It is simply a matter of relocating the file from San Francisco to Houston if a person moves.

Senator GRASSLEY. Do you have something to add?

Ms. MEISSNER. We were just conferring on what the problem might be. Perhaps you are talking about a foreign student, for in-

stance, who changes schools, or a person seeking work authorization. A decision is then required by the Immigration Service. These are changes in a person's status. Someone might remain an immigrant or a permanent resident but have a change in status.

To the extent that that status is based on a particular condition, for instance, in the case of a foreign student, the foreign student status is based on the presumption that he attends a school as a full time student. If that situation changes, it must come to the attention of the Immigration Service in order for us to determine whether or not his changed circumstances continue to make him eligible for foreign student status.

Foreign student is an area where we do a great deal of work and expend quite a bit of energy on changed circumstances. There are a variety of status questions like that which we are right now in the process of streamlining so that we focus only on the things that really have a direct bearing on the immigrant status of a person.

Senator GRASSLEY. Yes.

A part of the problem is a lack of uniformity of definition.

Ms. MEISSNER. That is correct. The foreign student example is a very good one because in that case the lack of uniformity has been very marked.

Senator GRASSLEY. You are suggesting that somebody else ought to have that responsibility.

Is that not going to complicate it to a greater extent?

Ms. MEISSNER. What I am suggesting is that we need to look at the numbers of decisions and the kinds of decisions that actually come before us as to whether or not they really are necessary. In the case of foreign students, we have a whole range of reforms that we are about to promulgate which will add to the uniformity and which will also limit the amount of time and effort that we expend on that category of people.

Senator GRASSLEY. But that is totally within your administrative purview.

Ms. MEISSNER. That is correct. Consistent with what the law requires, of course.

Senator GRASSLEY. Sure. And so those changes are being made, so that the problems that we perceive—and I think they are real—should be lessened.

Ms. MEISSNER. We are beginning to look at some of those things, and they are beginning to be lessened, yes.

Senator GRASSLEY. But is it not just as simple as somebody here will, say, at the central office, you know, seeing that there is uniformity of definition and having equal administration of that by people?

Ms. MEISSNER. It would seem that simple, but it is really not.

Senator GRASSLEY. Well, is there so much local autonomy that detracts from that? Is that the problem?

Ms. MEISSNER. No. It is the matter of how much discretion it is reasonable to assume that any particular district can exercise. One cannot put into absolute chapter and verse every kind of guideline for a decision that is made at the local level. We would want our officers to be able to exercise some discretion. But in the exercise of that discretion a common problem throughout the Government and the judiciary is how much discretion should be limited.

And that is what we are grappling with.

Senator GRASSLEY. So really, INS is not any different from any other government agency.

Ms. MEISSNER. I would hope so, that is correct.

May I just add one point in terms of your question to Mr. Bodin on the temporary worker program. In order to be certain that we are clear, the administration has most definitely come to the decision that an experimental temporary worker program with Mexico is needed and we would hope that the Congress would pass legislation on that point. The exact details of how that program will be administered have not been fully worked out, and I think that was what Mr. Bodin was saying.

Senator GRASSLEY. But in regard to my question about whether or not the misunderstanding about the need or not, and whether there are actually jobs that are there to be filled by these workers, obviously because of Mr. Bodin's lack of response, there has got to be some disagreement within the administration on that point. That is the way I interpret it.

Ms. MEISSNER. There is disagreement generally throughout the country as to whether or not there is a need for foreign workers, and the proposal that the administration has made is designed to test that proposition.

Senator GRASSLEY. Well, the newspaper article spoke to the disagreement around the country, but at the policy level eventually you have got to reach a point where there is no disagreement.

Ms. MEISSNER. And the policy is that there is enough evidence to indicate a need for workers in certain circumstances to attempt to fashion a program that meets that need.

Senator GRASSLEY. OK.

Senator SIMPSON. But one thing that remains stable in the process of determination is that the figure 50,000 is still being adhered to.

Is that not correct?

Ms. MEISSNER. That is correct.

Senator SIMPSON. Just one other question.

Of that 43,000 under the H-2 program, how many of those are involved in agriculture? Give me a very swift breakdown of what those 43,000 are.

Mr. BODIN. Yes. Approximately 18,000 are engaged in agriculture.

Senator SIMPSON. Excuse me. Right now does that mean herding? Does that mean we are getting into sheep and livestock?

Mr. BODIN. Yes, in your part of the country we certify sheepherders, in total, about 800 per year, on that order.

Senator SIMPSON. And those are Basques and Australians and New Zealanders?

Mr. BODIN. There are not as many Basques now, although Basques still continue to come, and there are also some Mexicans and Peruvians.

Senator SIMPSON. About 18,000 in agriculture?

Mr. BODIN. About 18,000 total for agriculture.

Of the others, the larger proportion by far of the remaining nearly 25,000 are in the professional, technical and managerial occupations, some, 12,500, and following that, in terms of numbers,

would be structural trades, construction workers and the like, some 6,000 of those.

Senator SIMPSON. That is interesting to me, because when we deal in this, this central issue of do these people take jobs from Americans that Americans will not do, that is a national question, and there are those that say yes, that is so. And your figures are very interesting to us, 15 percent going to agriculture, and the majority going to these other areas, which I think personally do compete for Americans, although your job is to certify that they do not. But it goes along with our full statistics that we see that about 13 to 15 percent of all illegal immigrants go into agriculture, only that amount. So that is a consistent figure that is interesting to me, that the legal certification process leads us to 15 percent in agriculture, and the illegal immigration and illegal alien flow, about 15 percent into agriculture, and the rest, just exactly that same breakdown.

Is that not correct, about?

Mr. BODIN. I am not aware of the figures on illegals, but that is an interesting finding.

Senator SIMPSON. It is indeed.

It would be higher with the illegals certification program, but in my mind, that leads me to believe that indeed they do compete, the illegal alien does compete with other jobs, and they are not all going to ones which are not sought by American citizens.

But anyway—

Senator GRASSLEY. Mr. Chairman, is the 50,000 new, proposed experimental program on top of the H-2 limit?

Senator SIMPSON. Fifty thousand temporary worker pilot program.

Senator GRASSLEY. So there is still a possibility of a continuation of like the 43,000 you had in this year?

Mr. BODIN. I do not know how that program would affect the numbers, but the H-2 program would continue, yes.

Senator SIMPSON. One of the Select Commission recommendations, and one thing we deal with in our hearings here is that we streamline "the H-2 process," which could lead to more numbers there.

Just a couple more questions, and then we will conclude this part of the panel.

I would ask Ms. Meissner, how has the Labor certification process been related, as you see it, to the INS adjudication process? Can they be tied together more closely or do they seem to work well now?

Ms. MEISSNER. I would agree with Mr. Bodin's statements on that question. The law requires essentially a bifurcation, and the two agencies work very closely now. I am not certain that we can find ways to do it more effectively and remain within the requirements of the law.

Senator SIMPSON. Let me ask one question of Ms. Meissner and Judge Milhollan.

I seem to get the sense in the hearing process—and from my background the Select Commission—that somehow immigration litigation provides more delaying tactics than perhaps any other

form of litigation I am aware of in my practice, and in my personal observation.

What is the feeling, of each of you having been backgrounded in the law, as to whether you perceive as I that immigration litigation seems to create delaying tactics that are more prevalent than in any other areas of litigation?

Ms. MEISSNER. I am not sure the delaying tactics are any more prevalent than in any other area of litigation. Litigation in itself is a laborious and time-consuming process. The difference, it seems to me, comes about in the fact that delays in immigration clearly serve the interest of the alien. Time is the friend of the alien and the enemy of the Government in bringing about any kind of justice.

The fact of the matter is that the extent to which an alien can delay the process is the extent to which he is very likely to develop equities in the United States which then allow him to derive or be eligible for a benefit to stay permanently.

So your impression may or may not be correct. We do not have any research or objective data on that subject. But the impression that the delays are greater is brought about by the fact that the effect of the delay works so directly to the benefit of the alien.

Senator SIMPSON. Do you have a response to that question?

Mr. MILHOLLAN. I would agree with what Mrs. Meissner has said, and I would point out also that the law anticipates in most instances changes on behalf of the alien. As she pointed out, it is usually to the benefit of an alien to remain here; the longer he stays here the more equities he may in fact acquire. We have seen various cases, many cases at the Board that have gone through a deportation proceeding, beginning through the appellate process, to court reviews, and after a certain number of years motions to reopen will come before the Board because now the alien is married, he has some children, he is eligible for adjustment of status or suspension of deportation, and those things are obviously not caused by the attorney. They are within the law.

Senator SIMPSON. It is interesting to me that we seem to reach a point with the alien issue that ties back to what you see in the criminal law which is, you know, give it the old sleeper cure and he will be all right. You do your criminal defendant client good work, and you do your illegal alien client, or nonimmigrant client, whatever it may be. That is an interesting and unpursued thing that I am not going to go into, but it does seem odd to me that it is the same type of philosophy of counsel of criminal law as in this type of law. And yet, we are not talking about crimes and criminals. We are only talking about—well, we are, in a sense we are, illegal aliens.

But in any event, thank you very much for your addition to our hearing record, and we appreciate it.

The next panel will be the attorneys panel consisting of Charles Foster, Esq., president of the American Immigration Lawyers Association; Sam Bernsen, Esq., former General Counsel of the INS and Director of Legal Research for the Select Commission on Immigration and Refugee Policy; and Leon Wildes, Esq., former president of the National Association of Immigration and Nationality Lawyers.

It is nice to see you here.

If you will proceed, Mr. Foster, recognizing the time limitations. I think we develop much more through questions and answers than we do through testimony, and your testimony will, in its entirety, be received in the record.

Please proceed.

**STATEMENT OF CHARLES C. FOSTER, ESQ., PRESIDENT,
AMERICAN IMMIGRATION LAWYERS ASSOCIATION**

Mr. FOSTER. Thank you, Senator.

I want to thank you and the subcommittee for this opportunity to testify on behalf of the American Immigration Lawyers Association. As you may know, we are an association of more than 1,500 attorneys who practice in this area. We have more than 23 chapters throughout the United States. We were organized in 1946.

I would like to just take the few minutes that you have allotted to me to summarize our positions regarding the topics that we were asked to testify on today. These positions were just recently reaffirmed at our board of governors meeting in Seattle, Wash., 2 weeks ago.

First, as already has been indicated, we strongly support, as does Ms. Meissner and the other people who have testified here today, establishment by statute of the independence of the immigration judge from the law enforcement side of the Immigration Service. We believe it is an anomaly that the immigration judge in this very important area is accountable to the District Director who is in fact one of the parties in the proceedings before the immigration judge. This is an important area that affects not only the rights of aliens, but the rights of their American relatives, the rights of their American employers, and at times, even touches on issues of foreign policy, particularly as we get into the area of asylum and refugee matters.

We believe that the immigration judge should have an independent budget, and, if the present system or structure is maintained, that it would be far preferable that the immigration judge would be accountable to the Board of Immigration Appeals rather than as present to the District Director.

We also believe that it is important that the recruitment process of the immigration judge be reconsidered. We consider it a serious matter that today immigration judges are recruited almost entirely from within the ranks, in other words, in order to become an immigration judge today, as a matter of practice, one must work his way up from the prosecutor side to become an immigration judge, and that creates an inherent bias in the system.

As far as the creation of a statutory Board of Immigration Appeals, as Ms. Meissner said, we would also favor an independent statutory agency, although we would prefer the article I court. We prefer the article I court but not at the expense of waiving the right of appeal that we presently have. We believe it is very important that we maintain the right of appeal to Federal courts of general jurisdiction. History has shown us that it has been the Federal courts of general jurisdiction which have brought to the process a more enlightened view based upon the Federal judge's general experience in various areas of law, and that specialized courts tend to

be very narrow in their scope at times. However, we believe that an article I court could be created, still maintaining the right of appeal.

In any event, whether it be an article I court or an independent statutory agency, the immigration judges would constitute the trial division. We believe that they should have substantially the same jurisdiction that they have today, although it could be expanded, to include all applications for discretionary relief and waivers, in fact, all petitions or applications necessary to resolve the matters that are before the immigration judge in a deportation or exclusionary hearing.

The Board would, in effect, become an appellate division and would substantially have the same jurisdiction it would have today, although for purposes of having uniform decisions throughout the country in this area of the law, and for purposes of economics, we favor the elimination of appeals to the regional commissioner, and have all appeals that are presently going to the regional commissioner go to the Board of Immigration Appeals, if it would become the appellate division of the new statutory agency, or the article I court.

Should Congress, as we would urge, create a review board of consular officers' decisions, which we believe is very necessary, such appellate division could also review appeals from such consular officer review boards.

We, as indicated in our written testimony, do not believe it is necessary that the Administrative Procedures Act apply to the immigration process. We believe that the present statutory framework provides for the necessary fair hearing requirements. Our greatest concern is for the creation of an independent judiciary within the Immigration Service, and if that was accomplished legislatively, then we believe the application of the Administrative Procedures Act would not be necessary.

On another matter that we were asked to testify on, we believe that there is far too much discretion written into the act itself. Many of the provisions that affect the substantive rights of aliens are qualified by the phrase "within the discretion of the Attorney General," and of course, as we all know, the Attorney General does not exercise that discretion. It is delegated down to the district director, who in turn delegates it down to the immigration examiner, and in practice, that discretion is often exercised not as it should be exercised, but often based upon the beliefs of the immigration examiner, depending upon the way he feels.

We believe that if discretion is maintained in the act, that it should have minimum guidelines, statutes of limitations, and minimum criteria.

And finally, we believe that if the budgetary problems of the Immigration Service were resolved, that in effect would eliminate the need for many appeals because many aliens are in the deportation process simply because the petition or application that they have had pending for many years has not been adjudicated in a timely manner by an immigration officer.

Thank you, Senator.

[The prepared statement of Mr. Foster follows:]

PREPARED STATEMENT OF CHARLES C. FOSTER

RECOMMENDATIONS FOR REFORM OF THE IMMIGRATION JUDICIARY

My name is Charles C. Foster. I am current President of the American Immigration Lawyers Association and appear at your invitation.

Our Association is a bar association established in 1946 which now has more than 1,500 members in 22 chapters and at large, throughout the continental United States and in such places as Hawaii, Guam, Puerto Rico, the Virgin Islands, the Bahamas, Canada, Hong Kong and England. In the past, representatives of our Association have testified on proposed legislation in the fields of immigration and nationality before your committee and other committees of the Congress. We hope that the accumulated expertise of our membership, who have worked on a daily basis with the Immigration and Nationality Act and the agencies involved in its administration, has been helpful in the shaping of legislation. During the last two years, many of our members have devoted considerable time to the study of the problems now confronting Congress by preparing detailed studies and presenting their recommendations for the use of the Select Commission on Immigration and Refugee Policy. We are, therefore, particularly pleased to have this opportunity to state our views at this hearing on those issues within our every-day experience. I wish, in particular, to address an area of great concern to our members, the structure of review of administrative decisions and the exercise of discretion within the Immigration and Naturalization Service.

1. INDEPENDENCE OF THE JUDICIARY

It is readily apparent that the present administrative structure of the immigration legal system is in dire need of fundamental changes. Our Association shares the interest of the Select Commission in promoting the integrity of, and increasing the

confidence in, administrative adjudications. We are particularly concerned about the need for an independent judiciary in the immigration system of administrative review, and wish to offer several recommendations for modifications of the present structure.

My comments focus on two issues of acute concern to the private bar:

1. the dependence of the immigration judge on the Immigration and Naturalization Service; and
2. the problems associated with the present selection and recruitment system of immigration judges.

Axiomatic to the dispensation of administrative justice is an adjudication process which is wholly detached, disinterested, and, hence, impartial. Under the present administrative structure, immigration judges are quasi-judicial officers, vested with authority to make independent decisions in deportation and exclusion proceedings. Thus, immigration judges are in theory independent and free from District Directors and other INS enforcement officials. However, a brief examination of the realities of the situation reveals a very different picture of the relationship between immigration judges and the Immigration Service. Despite their semi-autonomous status, immigration judges work under the administrative supervision of INS enforcement personnel. They are dependent on the District Directors and the Regional Commissioners for office space, hearing facilities, equipment, supplies, clerical and transcription support, translating personnel, calendars, maintenance of case files, and other services. District Directors, who have a strong enforcement bias, give low priority to the needs of immigration judges in allocating their limited resources. This lack of adequate support service to immigration judges is one of the major causes of the long delays encountered in the present adjudicatory process. In fact, in many small offices, the trial attorney actually controls the calendar and determines when adjournments are warranted and whether cases should be scheduled promptly or at some indeterminate time in the future.

In order to remedy this situation, immigration judges must be provided an independent budget and administrative support service, and should possess complete control over their calendar. This modification would provide immigration judges with the necessary control over the administration of their own hearings, and would relieve them from undue interference from Immigration Service enforcement officials.

The independence of immigration judges would also bring impartiality to the immigration adjudicatory process. Under the present administrative structure, immigration judges are formally accountable to the Immigration Service. They are ultimately hired by the INS Commissioner, and are evaluated by the Service for pay increases. Thus, they are directly accountable to officials who are involved in an adversary capacity in the immigration hearings. Their dependence on the INS clearly undermines the possibility of independent and impartial decision making. In order to bring impartiality to the decision making process, the immigration judges should be completely removed from the Immigration Service.

The present system of selection and recruitment of immigration judges also casts doubt on the neutrality and impartiality of the judges. Presently immigration judges are recruited almost exclusively from the ranks of INS personnel with prior prosecutorial and enforcement backgrounds. While this system of recruitment presents the advantage of yielding judges who possess expertise in immigration law, it is fraught with serious disadvantages.

As a Trial or Naturalization Attorney with the INS, the immigration judge was required to vigorously advocate and defend the Government's position in all cases. The natural tendency to import the prosecutorial psychology to the role of immigration judge creates a dangerous potential for tainted decisions. This situation clearly casts doubt on the role of the judge as one who dispenses impartial justice.

Therefore, the present system of selection and recruitment should be modified, in order to bring neutrality and impartiality to the adjudicatory process. Immigration judges should no longer be recruited exclusively from the ranks of INS employees. Affirmative efforts should be taken to expand the pool of candidates, to include individuals without prior employment with the INS. This goal could be implemented in part by consulting bar associations, who could identify a list of attorneys with special expertise in immigration law. This system of recruitment would have the advantage of providing qualified and impartial judges. Furthermore, in order to attract qualified candidates, immigration judges should be compensated at a salary commensurate with the nature of their responsibilities. Thus, they should receive a salary comparable to that of U.S. District Judges.

While these proposed modifications may not cure all the imperfections of the administrative structure, an independent judiciary should greatly contribute to a more impartial and efficient system of administrative justice.

2. APPELLATE JURISDICTION - ARTICLE I COURT

Our Association agrees with the Select Commission's proposal on the establishment of a new immigration court under Article I of the Constitution. The creation of such a court would remedy many of the inadequacies of the present system, because it would eliminate the layering of review that characterizes the present adjudicative process.

In line with the Commission's interest in a fair and efficient adjudicatory process, the Association wishes to make several recommendations regarding appellate jurisdiction under the Article I Court.

Immigration judges should possess broad powers to review adjudications of the District Officer as well as to preside over deportation and exclusion hearings. To further vouchsafe the neutrality and autonomy of the Immigration judge, the present lines of accountability should be restructured so that immigration judges would be directly responsible to the BIA, rather than the INS. This structure, whereby Immigration judges would serve under the supervision of the BIA, would be consonant with the concept of an independent judiciary.

An independent and impartial adjudicative process also requires the termination of the Regional Commissioner system of appellate jurisdiction. Under the present administrative structure, many decisions made by District Directors must be appealed to the Regional Commissioner. This avenue of appeal merely provides the individual with review of the decision by the District Director's administrative supervisor. Judicial review is thus made by an employee of the Immigration Service who, like the District Director, has an enforcement bias. Rarely is the reviewing officer an attorney even though numerous decisions deal with sophisticated points of law, such as the affiliation of the international components of a corporation, the characterization of crimes and the validity of marital status under foreign law. It is a well known fact among practitioners that the Regional Commissioner will only reverse those decisions which manifest an egregious miscarriage of justice. In the majority of cases, the Regional Commissioner will affirm the District Director's decision, on the rationale that the denial of relief sought was within the District Director's discretion.

For these reasons, decisions of the District Director should be appealed to the appellate division of the Article I Immigration court, in order to accord individuals an impartial and detached forum. The Committee see no articulable purpose to be served by maintaining the present structure of review of decisions rendered by

District Directors. It would be more consonant with the concept of an impartial adjudicatory process to have the immigration court, rather than the Regional Commissioner, review decisions rendered by District Directors.

Should the present Regional Commissioner appellate system nonetheless be maintained, only non-immigrant cases should be appealable to the Regional Commissioner. All immigrant or permanent resident cases, because they involve such important rights for the individual, should be appealed directly to the Board of Immigration Appeals.

The Association also recommends that appeals from the BIA to the Court of Appeals be available as a matter of right, rather than limited to only certain types of cases.

3. TENURE OF IMMIGRATION JUDGES

The Association feels that judges should not be appointed for lifetime tenure. The Committee agrees with the proposed revisions of the legal staff of the Commission, which would provide for a removal process of immigration judges. This removal process should be available for cases of "incompetency, misconduct in office, neglect of duty, or physical or mental disability." Immigration officers should be removable only for good cause, as determined by the office of personnel management. Such a removal process would compel immigration judges to conform to the highest level of professional conduct, and would thereby revive confidence in judicial integrity.

4. THE ADMINISTRATIVE PROCEDURE ACT AND DUE PROCESS GUARANTEES

Deportation and exclusion hearings are a legalistic anomaly. Although civil in nature, these hearings are undisputably criminal in character and result. The APA is designed to set forth basic

procedural requirements for civil administrative proceedings. Consequently, the APA is ill-suited to deal with the myriad special due process problems inherent in immigration proceedings.

We would recommend an elaboration and refinement of the proceedings as presently constituted. Without attempting to be exhaustive as to the full panoply of desirable revisions, I would like to briefly touch upon a few of the more essential ones.

a. Under the present law, INS officials have the authority to set the amount of bond and any other conditions for the release of an alien. Immigration enforcement officials often set arbitrary bail amounts. While the alien can appeal the amount of the bond by reequisting a bond redetermination hearing before an immigration judge, indigent aliens are often unduly kept in custody while awaiting the bond redetermination hearing. As part of his due process rights, an alien should be entitled to have bail initially set by an impartial adjudicator. For these reasons, the Association recommends that the immigration judge set bail in all cases before him or her.

b. The Federal Rules of Civil Procedure and Evidence should not systematically apply in the new immigration court. However, whenever appropriate, provisions of those rules should be incorporated in the rules of the Immigration Court. Rules of the new court should be adapted to the needs of this specialized field of law, with an eye to eliminating unnecessary features and cumbersome procedures. Where appropriate, the concepts of the Federal Rules of Criminal Procedure should be adopted.

The new rules should provide broad discovery right for the defendant, so that he have every chance of defending his case adequately. The new rules should also provide for various

constitutional rights, especially the right to counsel, the right to confront witnesses, the right to have separate suppression hearings, the right not to bear witness against oneself, and the right to a meaningful explanation of the process. These rights should be recognized as part of the alien's due process rights.

c. Under the present law, the subpoena is of limited use to the immigration practitioner, because the granting of a subpoena is subject to the District Director's discretion. Representatives of aliens should possess broad powers to request the issuance of subpoenas in order for the subpoena to serve a useful purpose. Moreover, any immigration officer serving the United States should be subject to subpoena, where appropriate. Specific provision should be made for other forms of discovery including depositions and interrogatories. Limited ability to adduce evidence at present severely curtails the alien's defense.

5. DISCRETION

Professor Kenneth Culp Davis, the noted authority on administrative law, has marveled over the unbounded discretion encountered in the immigration process. Every nook and cranny of the Act seems to instill in the immigration officer the power of determining the destiny of the alien subject to virtually no review. The overwhelming majority of these discretionary decisions are not charged to the immigration judges, but rather to officers in the adjudicatory process. Generally these officers are without legal training. Discretion is exercised arbitrarily, without basis in fact, and inconsistently.

Increasing officer training and meaningful supervision are imperative. However, even with these steps adequate control is impossible. Discretion must be curtailed and minimum standards for the factual basis of decision established. For instance, the law

should specify the criteria for suspension of deportation or perhaps even set a statute of limitations; permission to reapply after deportation should be replaced with a statute of limitations; and criteria for discretionary waiver of grounds of excludability should be established.

We thank the Subcommittee for the opportunity to present our views and will make ourselves available throughout this important deliberative process to any member of the Subcommittee or its staff.

Senator SIMPSON. Thank you very much.

Sam Bernsen, back again.

Mr. BERNSEN. Back again.

Senator SIMPSON. I remember our work together on the Select Commission, and you were very effective there, and I understand you are pursuing private business matters now, and we are very interested to hear your remarks.

STATEMENT OF SAM BERNSEN, ESQ., FORMER GENERAL COUNSEL OF IMMIGRATION AND NATURALIZATION SERVICE, AND DIRECTOR OF LEGAL RESEARCH FOR SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY

Mr. BERNSEN. Thank you, Senator.

I am here to speak for the alien who wants to comply with the immigration law.

Senator SIMPSON. Are there any?

Mr. BERNSEN. Millions.

The press, the public, and the Congress have been concerned primarily with one aspect of our immigration problem, illegal aliens. Little concern is shown for the qualified and eligible aliens who seek to enter or remain in the United States lawfully in either a permanent or temporary status. They endure many months, and even years, of delay while they wait for INS to act on applications and petitions filed in their behalf.

These grossly excessive delays are devastating, not only for the public that INS is mandated to serve, but even more so for the INS itself. Family relations are strained to the breaking point when a U.S. citizen husband is forced to wait a year or more for approval of his petition to bring his wife to the United States. Energy production and development in this country are held up while a U.S. company's petition to temporarily transfer a key scientist, technician, or manager from one of its subsidiaries abroad languishes in an INS file room or on someone's desk. Spouses and company executives anguishing over these delays bombard INS with follow-up inquiries, diverting the agency's meager staff from adjudicating cases to servicing complaints. Everyone loses. Clearly these delays are not acceptable. What can be done about them?

Some think the only answer is more personnel to process and adjudicate a workload that has doubled in 10 years and legislation to simplify the law. In my view, it is entirely unrealistic to expect an increase in INS staffing for adjudications work when we are drastically cutting back Federal expenditures. Although new legislation such as the efficiency bill, S. 1663, would be helpful, in the final analysis, it is the spirit and manner in which the law is implemented that determine how efficiently it works.

A great deal can be done administratively. The agency must recognize that the way in which it carries out its mission depends not only on the immigration statute, but also on the appropriations. The two are inseparable. The statute provides that a U.S. citizen husband can petition to bring his wife to the United States and that an American company can petition to temporarily transfer a key scientist from one of its foreign subsidiaries, but it is the appropriation which supplies the funding that authoritatively tells us how intensely these petitions can be scrutinized. With more funding, more supporting documentation for applications and petitions can be demanded and reviewed, more files can be created, transferred and examined, more interviews can be requested, conducted and transcribed, more investigations can be ordered, completed and reported. But the immigration statute does not mandate all of these. The extent to which they can be accomplished and keep the work current at the same time depends on the appropriation. Thus, adjudications of applications and petitions would be greatly expedited if INS would limit its files, documentary requirements, interviews, and investigations to the extent of its digestive capacity as permitted by the annual appropriation. It would, therefore, be an invaluable contribution to progress if this committee would send a clear signal to that effect.

With receipts of applications and petitions for immigration benefits approaching a level of 2 million annually, INS can no longer examine minutely each case to make certain that every "t" is crossed and every "i" is dotted. The system is crippled when decisions by INS are delayed for months and years. Can an eligible student who wants to comply with the law be expected to wait 11 months for INS permission to transfer to another school when the school requires him to begin attendance at the beginning of the semester? Can a qualified alien be expected to wait 10 months for INS to approve his application for change to a temporary employment status when the employer's need for the alien's temporary services is urgent? Can a U.S. citizen be expected to wait a year while INS decides whether to approve a petition that will enable his wife to join him in the United States? Can a stateless lawful permanent resident wait 4 months for a refugee travel document to enable her to visit a critically ill close relative abroad? Clearly the time-consuming procedures that cause these delays must be changed.

What is called for is intelligent implementation of the spirit of the law, not blind adherence to the letter. For example, INS has long recognized that an alien applying for admission at a port-of-entry should not be questioned on every one of the 33 grounds for exclusion. As a result, primary inspection interviews by an immigration officer average about 45 seconds each. But by some strange

quirk of human nature, if an application or petition is submitted by that same alien to that same immigration officer, he will minutely check each and every response and each and every supporting document, and will frequently request additional evidence.

Other Federal agencies which deal with heavy workloads have developed techniques which may be helpful to INS. Customs, for example, examines baggage on a random basis. The Internal Revenue Service audits about 2 percent of the tax returns. Similarly, INS could consider developing a list of factors which call for more than cursory review of an application or petition.

As a beginning step, INS should build a spirit of let's get the job done. It must be borne in mind that even under the present extensive and time-consuming procedures, about 95 percent of the applications and petitions are ultimately approved.

The role of the adjudicating officer has to be clarified. He must understand that he is not an adversary, that applications and petitions must be decided promptly, fairly and objectively on the basis of the record without partiality for the Government, the petitioner or the applicant. This is particularly important because of the discretion factor in so many types of cases.

To move applications and petitions along rapidly, time tables should be established as guidelines.

Senator SIMPSON. I hate to interrupt, but could you just summarize?

Mr. BERNSEN. I would also like to strongly suggest that we do something about our requirement that a file must be obtained and reviewed before you can adjudicate a petition because the files of the Immigration Service are in a state of perpetual motion and move from district office to district office, and within the district, from clerk to clerk, and adjudicator to adjudicator, and I think the time has come to simply make a computer check to see if there is any adverse information and dispose of an application or a petition on that basis.

In short, I think there is a great deal that we can do administratively if we do it in the right spirit.

[The prepared statement of Mr. Bernsen follows:]

PREPARED STATEMENT OF SAM BERNSEN*

The press, the public and the Congress have been concerned primarily with one aspect of our immigration problem -- illegal aliens. Little concern is shown for the qualified and eligible aliens who seek to enter or remain in the United States lawfully in either a permanent or temporary status. They endure many months, and even years, of delay while they wait for INS to act on applications and petitions filed in their behalf.

These grossly excessive delays are devastating, not only for the public that INS is mandated to serve, but even more so for the INS itself. Family relations are strained to the breaking point when a U.S. citizen husband is forced to wait a year or more for approval of his petition to bring his wife to the United States. Energy production and development in this country are held up while a U.S. company's petition to temporarily transfer a key scientist, technician or manager from one of its subsidiaries abroad languishes in an INS file room or on someone's desk. Spouses and company executives anguishing over these delays bombard INS with follow-up inquiries, diverting the agency's meager staff from adjudicating cases to servicing complaints. Everyone loses. Clearly these delays are not acceptable. What can be done about them?

Some think the only answer is more personnel to process and adjudicate a workload that has doubled in ten years and legislation to simplify the law. In my view it is entirely unrealistic

* Sam Bernsen is the former General Counsel of INS. Before that he was Assistant Commissioner for Adjudications. At one point in his career of over 35 years with INS he served as a District Director (New Orleans). He has been a practicing attorney in Washington, DC since his retirement from INS in 1977. He recently served as Director of Legal Research for the Select Commission on Immigration and Refugee Policy and is an Adjunct Professor of law at Catholic University's law school.

to expect an increase in INS staffing for adjudications work from a Government that is drastically cutting back federal expenditures. Although new legislation such as the so called "efficiency bill" (S.1663) would be helpful, in the final analysis it is the spirit and manner in which the law is implemented that determine how efficiently it works.

A great deal can be done administratively. The agency must recognize that the way in which it carries out its mission depends not only on the immigration statute but also on the appropriation ~~bill~~. The two are inseparable. The statute provides that a U.S. citizen husband can petition to bring his wife to the U.S., and that an American company can petition to temporarily transfer a key scientist from one of its foreign subsidiaries ~~to the U.S.~~ But it is the appropriation which supplies the funding that authoritatively tells us how intensely these petitions can be scrutinized. With more funding, more supporting documentation for applications and petitions can be demanded and reviewed; more files can be created, transferred and examined; more interviews can be requested, conducted and transcribed; more investigations can be ordered, completed and reported. But the immigration statute does not mandate all of these. The extent to which they can be accomplished and keep the work current at the same time depends on the appropriation. Thus adjudications of applications and petitions would be expedited if INS would limit its files, documentary requirements interviews and investigations to the extent of its digestive capacity as permitted by the annual appropriation. It would therefore be an invaluable contribution to progress if ~~the~~ ^{this} Committee would send a clear signal to this effect.

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longer examine minutely each case to make certain that every "t" is crossed and every "i" dotted. The system is crippled. when decisions by INS are delayed for months and years. Can an eligible student who wants to comply with the law be expected to wait eleven months for INS permission to transfer to another school when the school requires him to begin attendance at the beginning of the semester? Can a qualified alien be expected to wait ten months for INS to approve his application for change to a temporary employment status when the employer's need for the alien's temporary services is urgent? Can a U.S. citizen be expected to wait a year or more while INS decides whether to approve a petition that will enable his wife to join him in the U.S.? Can a stateless lawful permanent resident alien wait four months for a refugee travel document to enable her to visit a critically ill close relative abroad? Clearly the time-consuming procedures that cause these delays must be changed.

What is called for is intelligent implementation of the spirit of the law, not ^{blind} slavish adherence to the letter. For example, INS has long recognized that an alien applying for admission at a port-of-entry should not be questioned on every one of the 33 grounds of exclusion. As a result primary inspection interviews by an immigration officer average about 45 seconds each. But by some strange quirk of human nature if an application or petition is submitted by that same alien to that same immigration officer, he will minutely check each and every response and each and every supporting document, and will frequently request additional evidence.

Other federal agencies which deal with heavy workloads have developed techniques which may be helpful to INS. Customs, for example, examines baggage on a random basis. The Internal

Revenue Service audits about two percent of the tax returns. Similarly INS could consider developing a list of factors which call for more than cursory review of an application or petition.

As a beginning step INS should build a spirit of "Let's get the job done." It must be borne in mind that even under the present extensive ^{and this consuming} screening procedures about 95% of the applications and petitions are ultimately approved.

The role of the adjudicating officer should be clarified. It must be emphasized that the adjudicator is not an adversary, that applications and petitions must be decided promptly, fairly and objectively on the basis of the record without partiality for the Government, the petitioner or the applicant. This is particularly important because of the "discretion" factor in many types of cases.

To move applications and petitions along rapidly, time tables should be established as guide lines. They should govern each step in the process of the various cases: receipt of fee, recording, indexing, attaching files, routing, review, decision preparation, etc. If a relating file cannot be obtained by the file section within a specified period of time the application or petition should be sent to the adjudicating office without it. If the adjudicating office determines it needs the file and fails to obtain it in a prescribed time the decision should be made without the file. Otherwise the applicant or petitioner would be penalized for the Government's failure.

Special time tables should be set for completion of any required interviews and investigations.

Applications and petitions should not be returned to applicants and petitioners unless the information or documentation is essential.

Supervisory responsibility must be emphasized. Supervisors must be accountable for timely completion of cases. Requests for discretionary files, interviews and investigations should be permitted only if approved by a supervisor.

Special procedures should be established to expedite genuine emergency cases.

A major obstacle to the timely adjudication of applications and petitions is the tremendous movement of files. They are virtually in a state of perpetual motion, following the alien from district office to district office - moving within the district office from adjudicator to adjudicator, from clerk to clerk, from operating unit to operating unit, and frequently from the office that receives the case to a distant border post for adjudication. The result is thousands of lost files and sheer chaos. (See 29th Report by Committee on Government Operations, House Report No. 96-1459, October 17, 1980.) The time has come to adjudicate without first locating, obtaining and reviewing a relating file. The infrequent occasion when a file contains adverse information does not justify the wholesale delay in case completions and the costs involved. Utilization of the Service Lookout system and access by computer to the Master Index in the Central Office are more than adequate to accomplish a files check.

Uniformity in INS processing and decisions must be improved. From office to office procedures vary and are changed without notice to the public. An alien may travel hundreds of miles to an INS office to submit an adjustment application. On arriving on a Monday at 1p.m. the prospective applicant may be told that such applications can be filed in that particular office only before twelve noon on a Tuesday or Thursday.

The authority to make decisions on applications and petitions is conferred on the Attorney General. A review of the INS decisions would create the impression that the United States has 35 Attorneys General. Lacking binding precedent decisions to guide them on unsettled questions, the District Directors of INS who act for the Attorney General interpret the law as best they can. Important terms such as "affiliate" are construed in some districts to require absolute control by one organization over another. In other districts a showing of de facto control is sufficient. In one district a computer programmer is classified as a person of "distinguished merit and ability" but if the alien seeks a transfer to do the same work in another district, such classification may be denied because in that district the law is interpreted differently. One would expect that on the same set of facts, whether presented in New York, Los Angeles, or Chicago the Attorney General's delegates, acting on his behalf, would make the same decision. An increase in uniformity, by publishing more precedent cases, would be a major step in expediting INS decisions. Precedent decisions which are binding on all INS officers, settle controversial questions so that they can be disposed of promptly throughout the country.

The appellate system must be restructured to improve fairness and efficiency. Under the present structure there are five appellate bodies, the Board of Immigration Appeals (BIA) and four Regional Commissioners. The Board handles specified appeals. The others go to the Regional Commissioners. For example, petitions for children go to the BIA. But petitions for orphan children go to the Regional Commissioner. As is apparent there is no rational basis for this distinction. Logic, fairness and efficiency would seem to call for all appeals to go to one appellate body, the Board of Immigration Appeals.

However, it is said that the Board lacks the resources to handle the increased workload. The answer, it would appear, is to shift appellate funds and personnel from Regional Offices to the Board. Centralized appeals would not only promote uniformity, but the quality of decisions would be vastly improved. We also must keep in mind that a Regional Commissioner does not have a staff of attorneys to write decisions, as does the BIA. In Regional Offices the cases are reviewed and the oral arguments are heard by immigration examiners. They make and write the decisions and submit them to the Regional Commissioners for signature. Under the present scheme the appellate review function in the Region is just one of a multitude of responsibilities of the Regional Commissioner. On the other hand, the Board has only one responsibility: adjudication of appeals. Board members personally review the record, hear the arguments and decide the cases. A professional staff of attorneys then drafts the Board's formal opinions.

I believe that men and women of good will in the Immigration and Naturalization Service, with imaginative changes and innovations suited to the times can adjudicate applications and petitions on a timely basis in the interest of all concerned without a large increase in personnel and without waiting for changes in the law.

I will be glad to answer any questions.

Senator SIMPSON. Thank you very much.
Mr. Wildes, please.

STATEMENT OF LEON WILDES, ESQ., FORMER PRESIDENT, NATIONAL ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS

Mr. WILDES. Thank you very much. It is a privilege to be here. I appreciate, as well, the incorporation of my written remarks so that I may limit my oral presentation.

I have the advantage of being here as a practicing attorney, not on behalf of any bar association, so I can be a bit more freewheeling.

What I have to offer is, in a sense, against the interests of the practicing bar because if, in effect, an attorney's interest is in delaying the case, in confusion or obfuscation, the present system is just terrific. Built into it are so many confusing elements that the attorney needs a scorecard to determine who is going to get his particular appeal and who is going to handle his particular case. There is not a deportation case which can be tried without someone raising the issue of whether to adjourn the case while the district director, regional commissioner or some other officer determines what are the necessary applications required in order to do justice in the case.

What I suggest is really very simple. It has two parts to it, and I am very glad to hear that the Government has recommended them as well.

NEED FOR AN INDEPENDENT JUDICIARY

First is that the judiciary in the immigration administrative field must necessarily be independent. It is inconceivable that a judiciary should be under the surveillance and at the behest of one of the parties, particularly the prosecuting party, that an immigration judge should have no authority to dismiss a case because it has been improvidently begun, or that he cannot even get his decision typed unless the district director gives him typing facilities.

BROADER AUTHORITY FOR IMMIGRATION JUDGES

The second thing which I suggest is also a common sense approach to the problem, is that the immigration judge has to have full authority to determine the entire case. The district director must know when he issues an order to show cause in deportation proceedings, that he is in effect turning on a faucet and that out will pour additional authority which should lie in the immigration judge to handle every application, every petition, every request for a waiver or a status which that alien could conceivably request, so that there is no need or possibility of delay by sidestepping these issues and requesting adjournments to have other officers handle these applications.

And I think that these suggestions can be very easily accomplished with minimal statutory change. I am not particularly in favor of an article I court. I think it is too much to ask for at this point. But I do believe that by setting up a system whereby immigration judges, under the supervision and review of the Board of

Immigration Appeals of them, are either a separate agency or a completely separate division of the Justice Department, so that the money that goes to them in their appropriations is not in any way limited by the Attorney General, you will have a much more sensible system, and one which will require much less interference with the statutory procedure.

IF IMPLEMENTED, THESE SUGGESTIONS WOULD ELIMINATE DELAY

I could mention numerous cases in which we have had the experience, over the years of our cumulative practice as attorneys whose practices emphasize immigration work, of being successful in getting years of time for our clients simply because the Government's system did not work.

We are not really interested in that. We believe that if the immigration judge had the authority to make all the decisions necessary; if his decision was not influenced by outside parties, particularly the Justice Department which prosecutes these cases; if there were, as there is now, a unifying appeal so that there is one final word for the agency in Washington issuing from the Board of Immigration Appeals, and if there were, as there is now, an appeal to a generalist court, to the circuit courts of appeals, and I believe this should never be abandoned—I think we will have a much better and fairer system.

I have several individual suggestions that I would submit at this point, but in essence, what I am recommending is that the Board of Immigration Appeals be made a statutory body; that its authority and the tenure of its judges as well as that of immigration judges be set forth in the statute; that the authority of immigration judges be broadened to include all the necessary discretion and authority to handle all cases; that the statute adapt as many as possible of the Federal Rules of Civil Procedure which are there to be considered and used as guides in immigration procedures, particularly in discovery and motion practice; that the Board of Immigration Appeals and the immigration court, which I believe should be part of one entity, be separately funded without access or interference by either party that practices before these bodies; and that the present appeal from the Board of Immigration Appeals to the circuit courts of appeals be retained.

Thank you very much.

[The prepared statement of Mr. Wildes follows:]

PREPARED STATEMENT OF LEON WIDLES

My name is Leon Wildes. I am an attorney admitted to practice in the State of New York and my practice has been primarily in the field of Immigration and Nationality Law for a period of over twenty-two years. I am a contributor of articles to various law reviews* and a lecturer with the Practising Law Institute in the Immigration and Nationality field, as well as Adjunct Professor of Law at the Benjamin N. Cardozo School of Law of Yeshiva University. I previously served as National President of the American Immigration and Nationality Lawyers' Association and am presently a member of its Board of Governors and Co-Chairman of its Committee on Professional Ethics and Grievances. I am pleased to have been called upon to testify before the Committee with respect to the important matters which it has before it.

While over 22 years of experience in practicing law in the immigration field has given me no ready solutions, it has afforded me some insight into what I consider to be serious defects in the statutory system governing the deportation and the exclusion process. I consider it a privilege to set forth what I believe to be the two essential failings of the present statutory scheme, and to suggest a number of changes in the statute which I believe would be salutary.

THE PROBLEM WITH THE PRESENT SYSTEM

In my opinion, the two main problems with the present law are that:

1. The Immigration and Naturalization Service (I&NS) is vested with the conflicting and inconsistent functions of (a) responsibility to take necessary action to exclude and remove illegal aliens and, at the same time, (b) responsibility to adjudicate numerous applications for the benefit and relief of aliens, including illegal aliens, and
2. There is an essential element of unfairness in a semi-judicial system which is controlled by an enforcement branch, resulting in institutional unfairness, or at the very least, the appearance of such unfairness.

It is no wonder, given the contemporary pressures for the removal of illegal aliens as unfair competition in the work market, that I&NS focuses its efforts on the discharge of its enforcement duties, to the detriment of its adjudicative responsibilities. The public perception of the effectiveness of I&NS has not been enhanced by the fact that applications and petitions languish for months and even years before they are adjudicated. It is, therefore, to everyone's advantage that the I&NS separate its enforcement functions from those within its benefit-adjudicative jurisdiction. Indeed, a separate budget for each function would appear to be most appropriate. I will confine my remarks, however, to the statutory scheme for the determination of exclusion and deportation cases, the second problem which I have mentioned.

The present system calls for many decision-making processes and adjudications to take place at various different levels of the I&NS. Sections 236 and 242 of the Immigration and Nationality

* "The Need for a Specialized Immigration Court: A Practical Response, by Leon Wildes, from the San Diego Law Review, Volume 18, No. 1, 1980.

Act set forth the jurisdiction of Immigration Judges in exclusion and deportation proceedings, while Section 106(a) provides for a direct appeal to the United States circuit courts. Concurrently, petitions for various exemptions, waivers and preferences, generally needed for the complete adjudication of a deportation or exclusion proceeding, are decided at the district office level, subject to appeal to the Regional Commissioner or to the Board of Immigration Appeals and ultimately to the Attorney General. Applications for waivers and relief can in certain circumstances be made or must be made to the I&NS, while in other circumstances Immigration Judges have been granted jurisdiction. Similarly, claims for asylum and refugee status are sometimes required to be presented to the District Director and on other occasions in the course of a proceeding before an Immigration Judge. All denials of applications and/or petitions are subject to motions to reopen and/or reconsider in accordance with procedures prescribed by regulation. In addition to the supposed "exclusive" remedy of appeal to the courts of appeals in exclusion and deportation proceedings, there exist numerous collateral actions which can be brought to secure mandamus, declaratory relief, injunctive relief or habeas corpus. These, and other forms of relief at the District Court level, have evolved to protect other aspects of the alien's status in the United States against prejudicial action by I&NS and Labor Department officials.

At present, the alien appears before an administrative judge who is, without doubt, unduly fettered by the supervisory and other powers of the U.S. Department of Justice over his facilities and activities. Indeed, the judge is beholden to the government for his very office and all his administrative amenities.

On numerous occasions during proceedings before the Immigration Judge, the alien will require adjudication of a petition or application or other requests for a benefit by the District Director or another official of the I&NS. Invariably, a debate will ensue whether the proceeding shall be adjourned to a later date or whether, in effect, the alien will be removed from the country by one arm of the same body, by reason of the fact that another arm had not yet adjudicated his request for a benefit. The system obviously is in need of repair.

Likewise, and despite the fact that the alien has a right of cross-examination in the proceeding, he lacks the necessarily included power to compel the attendance of witnesses necessary for his defense. To achieve this vital right, which is clearly encompassed in the due process to which he should be entitled, he must necessarily present his request for the issuance of a subpoena to an Immigration Judge supervised by the same agency which prosecutes him. As a practical matter resulting from the government's improper recruitment process, his entire appearance before an Immigration Judge often results in utter disappointment because most Immigration Judges were formerly I&NS prosecuting attorneys, and many have found it impossible to make the transition from ardent advocate to impartial adjudicator. The "judge" cannot even get his decision typed unless the "prosecutor" makes facilities available.

SOME SUGGESTIONS FOR STATUTORY AMENDMENTS

In general, I would recommend the streamlining and simplification of the present system, rather than any major statutory overhaul. Changes should contribute to the smooth and complete determination of exclusion and deportation proceedings and to their determination by a system which is essentially fair and free of the pressure inherent when it is controlled by an enforce-

ment branch of an agency. I would offer the following specific suggestions:

1. Making the Board of Immigration Appeals (BIA) a Statutory Agency.

All appeals from deportation and exclusion orders are presently heard by the BIA, currently a creature of regulation, which reaches a final determination by the agency. It serves a useful purpose in rendering a considered decision in behalf of the agency on a national level, which can be reviewed in the present system by the U.S. circuit court of appeals. Without it, there would be a serious problem in achieving uniformity of decision, an absolute necessity if aliens are to know their rights, moreover, the statute of regulations should set forth a procedure by which oral argument could be made in locations other than Washington, D.C. for the convenience of aliens and their representatives.

2. The Immigration Judges and the BIA Should be Free of Control and Completely Separated from the I&NS.

Impartiality of decision in deportation and exclusion cases can only be achieved by a completely independent administrative judge. The statute should be amended to provide for a separate entity, separately funded, for the administration of the immigration courts and the BIA. No I&NS official should have jurisdiction in any matter to determine the qualifications, facilities, or authority of Immigration Judges or BIA members. The creation of the post of Chief Administrative Judge may be useful in assuring that independent Immigration Judges are available to conduct hearings wherever needed.

Qualifications of Immigration Judges and BIA members should likewise be specified by the statute and upgraded.

3. Broadening the Authority of Immigration Judges.

In order to assure that the Immigration Judge, whose qualifications would be raised, has authority to dispose of the entire case, he should be accorded all of the authority delegated to District Directors and other officials of I&NS which he may require to adjudicate every application which an alien may file. The presumption should be in favor of full authority and only exceptions specified. His decision should contain his rulings with respect to all applications filed. This would have the affect of avoiding dilatory tactics which the present system encourages.

4. The Statute Should Adapt the Federal Rules of Civil or Criminal Procedure.

In order to permit appropriate procedures required for a fair hearing, and to avoid technical appeals based on denial of a fair hearing, rules should be adapted as appropriate to the deportation and exclusion process to protect the rights of aliens

appearing before Immigration Judges, and to assure that a complete record is transmitted to the BIA and the circuit court.

5. The Immigration Court and the BIA Should be Adequately and Separately Funded.

It may be expected that the additional jurisdiction of Immigration Judges to adjudicate all applications necessary to dispose of cases will lighten the task of District Directors and permit the complete adjudication of cases without delay. To assure the separation of functions and the expeditious handing down of decisions, an adequate and separate budget would be required.

6. The Present Direct Appeal from the BIA to the Circuit Courts Should be Retained.

The existing procedure does have the affect of limiting to a great extent the number of appeals which find their way into the U.S. District Court in immigration matters. Also, it is important in immigration matters on this level that generalist judges bring to bear upon immigration issues the general principles of law with which they deal in other areas. In the past, much of the innovation, progress and forward-looking law which has been developed and created in the immigration field has been a direct result of the opportunity given to courts of general jurisdiction to take a fresh look at a policy, procedure or ruling which has been developed and taken for granted by the I&NS, Immigration Judges and even the BIA.

CONCLUSION

It is suggested that the two major problem areas in our present system of dealing with exclusion and deportation proceedings can be dealt with by statutory amendments which would not require a complete overhaul of the Immigration and Nationality Act.

I take this opportunity to thank the Committee for the opportunity to present my views.

Senator SIMPSON. Thank you very much.

That is exceedingly fine testimony from each of you, and I look forward to a thorough review of your written testimony.

You are in it. It is very helpful to have your views. You each have a very unique background to give us on the subcommittee.

Let me ask several questions here.

Mr. Foster, what do you believe that your group, the group that you represent, might do to assist in the very speediest adjudication cases without going back to the fact that the INS needs upgrading and needs to do things, and all of those are so very real and so very true? But you know it, you know the intricacies of it. How do we best get to speedy adjudication of cases which in our criminal law are part of our constitutional due process?

So what is your thought there?

Mr. FOSTER. Well, of course, we are an association, and we are made up of more than 1,500 individual members, and each member must decide. He has as an attorney the obligation to defend his client, and he must do that to the extent the law permits.

I think, as has already been mentioned here, that few attorneys want delay per se. In fact, most attorneys are able to evaluate a case, and if a person is not entitled to any equities in the United States, if there is no legal basis for ultimate permanent residence status based on family relations or labor certification, then there is no real incentive in seeking delay.

So if the system itself produces delay, it is because in most cases the attorney is waiting for the Government to adjudicate a labor certification or visa petition or family petition. If there was not some underlying basis in the law already for that person to remain in the United States, the chances are that attorney would not be filing appeal; he would simply be asking for voluntary departure.

Senator SIMPSON. This is perhaps unfair or untoward, and I hesitate to put that premise on it, but do you feel that the delaying tactics used by the bar involved in immigration matters are more common than in other areas of litigation? It seems as we process it and the correspondence we get, and the hearings, that the immigration attorneys—and we mentioned this to the panel the other day, an exceedingly capable and professional group of attorneys who are involved with immigration matters—but that they have raised delay to an art form with more skill and ability than their brothers and sisters in the bar in any other area.

What is your thought on that?

Mr. FOSTER. I know you are referring to the Haitian litigation right now.

Senator SIMPSON. Some of that.

Mr. FOSTER. Perhaps the Haitian situation is an exception to the general practice, but I think that while there may be some delay caused by questionable litigation my honest belief is the attorneys who are pursuing what one person may characterize as delay, another person would characterize it as fundamental due process and the rights of that person. If there is such delay, and I am sure there are cases of attorneys filing appeals where that attorney knows in advance there may be little merit, I think that such litigation is the exception, and normally where an attorney does file what some may characterize as having no chance of ultimate suc-

cess, he justifies it because he believes the Government on the other hand has delayed in adjudicating a basis for this client to remain in the United States.

Senator SIMPSON. Well, it is disturbing. As an attorney in my other life myself—I am not involved in any part of a practice since I came here. I resigned from 20 years of a partnership. But it disturbs me, and we get the same number, I guess, whether you are in Wyoming or New York or Washington, of those who of the profession choose to misuse the system. But we have reports coming to us on the subcommittee concerning some, you know, questionable practices of lawyers in immigration matters, exploitation of aliens seeking assistance in immigration procedures, and some portion at least of the immigration bar which really has no interest in changing anything because of the extraordinary benefits to them by practicing in this morasse.

And then we find, too, fees seem somewhat out of context with reality, things that the voluntary agencies could have done very well free of charge for the person involved, an attorney is entered into—and I guess you are always going to have that when you are into areas like adoption practice, where you can get the child for about \$3,000 if you have the right contacts, when actually it costs about \$250 if you went through the system.

I guess that will always be, but what are your views on that allegation?

I ask that not as a baiting question, but I ask that as one who deeply loves the practice of law and hopes to practice it in a way that is appropriate.

Mr. FOSTER. I share your concern, Senator Simpson. I believe that any bar association must be concerned with the ethical considerations, and I also recognize, and as an association president, I have written and spoken on this, in this area particularly we attorneys have a duty, even a higher duty to our client because by definition often that client is an alien, who is unfamiliar with the system, who believes that simply by knowing someone, and just pay something, something is done, because this may be practiced in his country. We as lawyers in this association are professionals. The fees should be, like all fees, be set and established based upon the complexity of the matter and the time involved. And I think by far and away, most attorneys who practice in this field, charge fees that are reasonable.

Part of the reason fees may be larger than nominal fees is because you hardly ever represent an alien in an immigration case where you are not looking at a representation that will go on six months to several years. And so you cannot charge a nominal fee for that. You are going to be living with that person when you accept that case for the next several years.

As far as ethics, Mr. Leon Wildes, who is sitting to my left, is chairman of our Ethics Committee. We are most concerned. Good moral character is a requirement for association membership. We have also removed members who have misrepresented aliens. In the State of Texas, the State Bar has pioneered specialization, with the State Bar itself designating individuals who have met minimum standards of competency in certain areas of the law, including immigration and naturalization law, so the alien would be pro-

tected and know which attorneys have demonstrated by a written test and by going through a review of ethical and other considerations by a board of legal specialization set up by the State Bar to show that these were attorneys who met minimum standards to practice in this area. So we are very concerned about this.

Senator SIMPSON. Thank you.

Mr. Bernsen, you present a rather bleak picture of the INS in its relation to "outsiders." If you had the power and were serving as Commissioner or in a position of higher responsibility, and with your great background, thorough background, what specific actions would you take to, No. 1, increase morale, and two, assure a better attitude toward "outsiders" who are also known in that trade sometimes as taxpayers?

Mr. BERNSEN. I think one problem with morale is there is very little contact between the headquarters of the Immigration Service and the people in the field. During the time I was in the Immigration Service we used to do a lot of missionary work. We would travel from the headquarters office out into the field and deal with the officers doing their job so we could discuss mutual problems, the problem of the officer on the firing line dealing with the alien, and the problem of the headquarters office. That builds a relationship.

The way we have it now, we have the officer in the field referring to that SOB in Washington. It would help morale if there were more contact between the higher level people and the lower level.

Senator SIMPSON. That is an interesting response because that is one of the significant objectives of the new Commissioner-designate. That is something I have heard him say as to what he intends to do to remedy that. It is similar to what you are stating.

Mr. BERNSEN. May I add one other item to that, Senator? I think the people in the Immigration Service also should be assured that if they can do the job efficiently and quickly, that does not mean that their grades will be reduced. I think there is a great deal of fear that if you are able to make the job go quickly and simply, this means the job does not justify the grade they have, and they worry about being subject to a grade loss.

Senator SIMPSON. That is interesting and true. Indeed, it is.

There has been a discussion in various arenas of the separation of the service function and the enforcement function of the INS.

Do you feel that kind of change would be helpful.

Mr. BERNSEN. I think the change would be helpful. I think it is called for. What we have today is the enforcement people and border patrolmen and investigators moving up through the ranks to where they become the district directors and the regional commissioners of the Immigration Service. As enforcement people, they are the ones making the decisions on applications and petitions where they are required to be objective and impartial, and they bring this enforcement background into a judicial role. It is pretty hard for them to take off the policeman's hat that they wore for so many years, and put on a judge's hat today and make an impartial decision.

Senator SIMPSON. Do you feel that adjustment of status problems which seem to take a great deal of time within the INS could be

substantially lessened or resolved if we were to restrict substantially the nonimmigrant adjustments to immigrants?

Mr. BERNSEN. I do not think so. The fact is that we would be turning our back on history if we limited or cut out adjustment of status. When we have an alien who is fully eligible for permanent residence and he happens to be in the United States—he has met all the requirements, labor certification, availability of a visa number and everything else—what purpose does it serve to make that alien go all the way back to India or China and get his immigrant visa?

We learned that 30 or 45 years ago, it was the Congress that said, if you check the legislative history, that makes no sense. If he is fully eligible and he is here, let him get permanent residence here.

Senator SIMPSON. Just one more, a couple more, a question for Mr. Wildes.

Could you comment on the roles of district director, regional director, and immigration judges in this adjudication process?

Do you feel that that adjudication process could be substantially simplified? Of course, you do, and I wonder if you could rephrase that for me.

Mr. BERNSEN. The adjudication process can be greatly simplified by what I believe should be cursory review. Immigration could develop, for example, a list of factors which require more than a cursory review so that those cases can be looked at a little more intensely. They would be the cases that need an interview or an investigation. But the vast majority of the cases, perhaps 90 percent of them, present simple, straightforward issues that can be disposed of immediately.

The Service tried an experiment, what they called up front adjudication, that is, where the cases were adjudicated the instant they were brought in. They were assigned to an officer, and a decision was made. The experiment showed that could work very well. I do not know why Immigration does not make that a nationwide practice.

Senator SIMPSON. I thank you.

I was interested in your comments and your remarks that you believe we could go or at least begin to pursue, I think, a policy of approaching some of the INS applications and petitions in the same way that the Internal Revenue Service might approach the handling of tax returns, in other words, granting an assumption under penalty or pain of law that they are correct and truthful, and then doing the spot checks.

That is something we have thought of. I know Senator Kennedy has been interested in that. Others—I have been interested in it, others have been interested in it. Most of the committee are looking at that, the subcommittee, as a possibility.

Do you think that would be appropriate and workable?

Mr. BERNSEN. I think it would be appropriate, and I think it would be workable, and I think we ought to get started on it.

Senator SIMPSON. What is your thought on that?

Mr. FOSTER. I am glad you asked. I think it is workable. I think if you had the right immigration officer who is knowledgeable, he can make a spot check, if you want to call it that. Any immigration

attorney who practices knows the two or three things you must look at, and if they are there, then it is a good case. And there is no reason why immigration examiners have to take nearly the length of time they take to sit on those cases.

We have a feeling in the practice that the Immigration Service sometimes intentionally leaves cases alone, on the theory that the good ones will rise to the surface if they are left alone long enough, and the bad ones will fall to the bottom.

But like in the area where you are from, Senator Simpson, in Wyoming, if you are trying to get a drilling crew into Wyoming, if it takes 6 months and you need a key person on the job from Canada, then that theory does not work very well.

So I agree with Mr. Bernsen that trained INS examiners can make cursory reviews, reviewing and adjudicating clean petitions very quickly, looking at the key areas and setting aside the problem petitions for a more indepth review, or in extreme cases, investigations.

Senator SIMPSON. What is your response?

Mr. WILDES. I agree with the question. I do not see why those applications cannot be submitted with notices of approval already prepared so that all the Government has to do is review them cursorily and stamp them and get them out. There are a lot of small labor-saving devices which for some reason or another have not occurred to the Immigration Service, which sits with boxes full of unadjudicated applications, most of which would require only a few moments time to actually act upon.

Senator SIMPSON. I have a couple of questions of you, Mr. Bernsen.

One of the things in the Select Commission which we grappled with was clearing the backlog, you remember, and of course, in essence, when you opened your remarks, you said there are aliens who do want to come here legally, and I made a certain flip comment, and it was not intended as such, but it is so true that one of the frustrations was to see those that had been in the pipeline so long and who are so frustrated by what they know, the one thing they know is the illegal flow into the United States. Everybody in the world knows that one. We are identified as the patsies of the earth for that.

So the read of that and their frustration builds, and I recall so well, you know, in dealing with that, as to clearing the backlog, and especially if we were to go to a legalization procedure for those that are already here prior to a certain date, and weighing the equities and so on, clearing those backlogs, especially in the area of family reunification, which is a national immigration philosophy, and that, you know, that is very real. And yet those backlogs and some preferences, you know, hundreds of thousands.

So that is another part of the pegboard. But I very much appreciate your view that there are so many waiting patiently and now impatiently with great frustration, they are in the pipeline, they have done everything right, they see how little we do and how little attention we pay to these other things.

So I thank you.

And I would ask Mr. Wildes, I have been interested, your remarks about the rules of civil procedure, this is what has been in-

teresting to me, in seeing how these immigration judges operate. Somehow they have escaped the net of the Federal Rules of Criminal Procedure, they have escaped the Federal Rules of Civil Procedure, they have escaped the net of administrative practice rules, laws, regulations, and you mentioned that they would be very helpful to get into that or to put them under the aegis of the simple rules of civil procedure.

Do you think that would be helpful in a form of pretrial, too? You mentioned discovery, but an attorney 2 days ago was really talking about what is a pretrial system. I believe it was a woman representing 200 or 300 persons, and consolidated those cases and pulled them together on specific issues just like you would do in a pretrial.

What is your thought there?

Mr. WILDES. Without question, I would be in favor of anything that simplified the system and made for fewer trials. No attorney who is worth his salt wants to take a client before a judge not knowing the outcome of the case. If that can be settled as you would in a civil court by having a pretrial hearing in chambers, or if the issues could be clarified so that the parties agree on certain facts which become a part of the record, the trial could be trimmed and limited to its proper proportion.

I do not think we use enough of these procedures. I would also like to see a motion part where we have several of these immigration judges—unfortunately, we file motions with Government trial attorneys; often they never find their way to the immigration judge, and neither does the file. As a result, we are aggrieved and have to try to press that these files be located, these motions be dug up and the matters brought on for some sort of hearing.

It seems to me that we could have, in the larger districts, a motion part where a judge would sit and hear motions and dispose of cases. I would be in favor of anything that disposed of cases, and I would feel that if the immigration judge's authority were expanded, there would be no harm. He is certainly at least as qualified as the district director or his designee to determine if someone is a child of another party or a proper spouse, or whether that party is entitled to an occupational preference based on a Labor certification, or to a waiver.

It seems to me that a lot of these procedures, once we get to the hearing stage, could be simplified and an entire record made, which is another problem in this area. If the record could be consolidated into one area; if one man could adjudicate all applications and reach one decision, and that funnels through the Board of Immigration Appeals which refines it, then in those few cases which reach the courts you would have a very clear establishment of the law, and you would avoid a lot of unnecessary additional activities on the part of a lot of different Government officials.

You truly need a scorecard to determine who is going to handle an appeal in various matters that can come up in one proceeding.

Senator SIMPSON. Well, that is perhaps right back to a summary judgment proceeding, or the recognition of the significant novelty of immigration. But that is so true. I see that so often in this place; dealing with the Nuclear Regulatory Commission, they have set up an administrative procedure act of their own called the Nuclear

Regulatory Commission Administrative Procedure Act. It does not have anything to do with anything else in the world, but it is the most extraordinary thing, where brother and sister of the bar again have just kind of made a layering process out of it, even if to justify their own existence within the agency or any agency. And it seems to me we ought to use the guideline of something which had hearings and went throughout the United States, and the States adopt it with advisory committees, and an integrated bar, and stick with the federal rules of civil procedure, or minor variations there-to.

Maybe we could get to that. Certainly the INA is incomprehensible in many places. I mean, it is second only to the Internal Revenue Code in its complexity, without question.

Mr. WILDES. Just as an example, if I may interpose, of what the Government can do when it is well-intentioned in this field, in New York we have a MASH proceeding. That is an acronym for multiple accelerated summary hearing, so that when immigration deportation hearings involve only a routine request for voluntary departure, they are handled one after another on a calendar call with a trial attorney standing there to represent the Government, and each party, with or without an attorney, appearing to request a period of time.

I do blame the INS for the fact that they have not come up with more of these procedures to simplify their own system. I think a lot of this is inherent in the system. And then again, we are back to what Mr. Bernsen has been pointing out, the lack of funds and personnel; the fact that constantly, when you ask why can they not do these applications up front, your response immediately is what about the tremendous backlog of all those boxes of applications we have pending upstairs?

And it seems to me that what the service needs is a good businessman's approach. A businessman takes over a business, closes it down for as long as it takes to take inventory, finds out what he has got in old merchandise, and determines whether he ought to run a sale or do something to expedite and clean out the old merchandise. Then he institutes system after system to see that those problems do not recur.

Senator SIMPSON. I think from the personal visits I have had with the Commissioner, and knowing him, that we may well see that businessman's approach in ways that have never been used before, and then realizing that in the 3 years that Agency has been without a Commissioner, there are things.

Well one further comment. We talked about the article I court which is going to get a misnomer of a topical court, I think like we are talking about, with the possible topical court over in judiciary on that issue, and that I want to develop some more and get your views on that and submit some questions in writing. I gather that neither of you really, or all three of you—well, Sam, you believe in the formation of an article I court.

Mr. BERNSEN. I personally do not.

Senator SIMPSON. The Commission did, and you do not.

Mr. WILDES. I do not think it is necessary.

Senator SIMPSON. And you do not.

Mr. FOSTER. Our position is that we would support it, provided we could still maintain the right of appeal. So I might as well say if the condition is that with an article I court, one does not have a right of appeal to Federal courts of general jurisdiction, then we would not favor it; we would prefer the statutory agency.

Senator SIMPSON. I see the American Bar and the trial lawyers do not favor the topical court process or thrust.

Anyway, that is a subject of another time.

I thank you very much. You have been very helpful to the subcommittee.

Thank you.

We will take a 5 minute break.

[A brief recess was taken.]

Senator SIMPSON. We will proceed with the judges panel.

I greet you all. It is nice to see you.

We have Joseph W. Monsanto, the Acting Chief Immigration Judge, Immigration and Naturalization Service; Maurice Roberts—it is nice to see you again, sir—former chief judge of the Board of Immigration Appeals, and editor of "Interpreter Releases;" Ralph Farb, a former member of the Board of Immigration Appeals; and Anthony de Gaeto, president of the Association of Immigration Judges.

And you are aware of the time limits on the presentation, and it is very nice to have you here this morning, and we appreciate hearing your remarks.

Mr. Monsanto.

STATEMENT OF JOSEPH W. MONSANTO, ACTING CHIEF IMMIGRATION JUDGE, IMMIGRATION AND NATURALIZATION SERVICE

Judge MONSANTO. Thank you, Senator.

I would like to thank the members of the subcommittee for inviting me to appear today to discuss issues relating to the role of the immigration judge in the administration of the immigration laws.

As acting chief immigration judge, under the Commissioner of the Immigration and Naturalization, I am responsible for the quality of decisions rendered by immigration judges, as well as the assignment of immigration judges, and the overall monitoring of the immigration judge system. For example, as in the case of the recent hearings held in Atlanta as the result of the Mariel Cuban boatlift, as well as the hearings held because of the influx of large numbers of Haitians into Florida, I have worked closely with the Immigration Service to insure that immigration judges were assigned to meet the heavy workloads.

In my role as acting chief immigration judge, and prior to this, as an immigration judge, I have become strongly aware of certain basic difficulties confronting immigration judges in the conduct of their duties. As you know, there are 42 assigned immigration judge positions, some of which are presently vacant. This small number of persons handled approximately 60,000 deportation and exclusion cases in the last fiscal year. The great majority of these cases were deportation cases, many of a fairly straightforward nature which did not require a great deal of the immigration judge's time. The remaining cases, however, often involve difficult questions of law

or fact or both; or they require a discretionary judgment on an alien's qualification for relief from deportation on any of the numerous grounds set forth in the immigration laws. It is these types of cases which consume a significant portion of any immigration judge's time, and rightly so.

With the passage of the Refugee Act of 1980, an additional difficult and time-consuming question has been presented for resolution by an immigration judge: The issue of eligibility for asylum or withholding of deportation. As has been noted, since the passage of the Refugee Act, approximately 53,000 asylum applications were received by the Immigration Service. It can be anticipated that the overwhelming percentage of the unsuccessful applicants will at some point appear before an immigration judge in the context of an exclusion or deportation hearing, because most of the applicants at some point will be brought into such proceedings.

Our experience with such asylum cases up until now frankly does not permit me to be overly optimistic that the asylum applications will be speedily adjudicated. You are aware of the administrative problems presented in simply scheduling a large number of cases, as well as the delays which are encountered in obtaining advisory opinions. Added to this are the numerous legal challenges to the entire asylum process which have been instituted by various groups and attorneys representing asylum applicants. These suits, particularly in the case of the Haitian applicants, have resulted in substantial delays in the entire hearing process. In the *Sannon* case, presently under appeal by the Government in the fifth circuit court of appeals, the entire asylum procedure was put under prolonged scrutiny, through several changes in the hearing process, over a period of almost 6 years. In a case presently being heard in the district court, also involving Haitians, we have been enjoined from proceeding with hearings to determine either deportability or exclusion, or eligibility for asylum. In most of these cases, a decision has already been issued by an immigration judge, with the possibility existing of the Government being forced to rehear the same cases, which number in the thousands.

In the meantime, in many districts, the backlogs on the immigration judges calendars continue to grow. This means that many persons illegally in the United States will remain for long periods of time before their cases may be heard. This situation should not be allowed to continue. One important way of addressing the problem would be to remove the asylum question from the immigration judges' jurisdiction and place it in the hands of a trained asylum officer, as proposed by the administration. This would help free our calendars of many potentially lengthy cases while at the same time insuring that the important asylum issue is given adequate hearing. The proposed procedure would allow immigration judges to concentrate on questions of deportability and excludability, and free them from what is in actuality a collateral but important issue.

A second change in authority which should be considered is one that would separate the immigration judges from the Service. Immigration judges presently come under the administrative responsibility of the Immigration and Naturalization Service. Although under this system immigration judges do in fact exercise independ-

ent, impartial judgment, two problems persist. The first is the perception that immigration judges cannot be impartial if they come within Service control because the Service, at least in its deportation and exclusion function, is an enforcement agency. Second, it makes immigration judges dependent on the Service for administrative support. In some districts this relationship works well; in others, there are problems with priorities established by district directors. The Department is giving serious consideration to establishing a more independent immigration judge system. I would suggest that the immigration judges remain in the administrative law process, as this would avoid an immigration law system which is overly formal and legalistic. The administrative adjudication of deportability or excludability can and does work.

Thank you, Senator. I would be most happy to answer any questions.

[The prepared statement of Mr. Monsanto follows:]

PREPARED STATEMENT OF JOSEPH W. MONSANTO

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Immigration Judges' jurisdiction, and place it in the hands of a trained asylum officer, as proposed by the Administration. This would help free our calendars of many potentially lengthy cases, while at the same time insuring that the important asylum issue is given adequate hearing. The proposed procedure would allow Immigration Judges to concentrate on questions of deportability and excludability, and free them from what is in actuality a collateral, but important issue.

A second change in authority which should be considered is one that would separate Immigration Judges from the Service. Immigration Judges presently come under the administrative responsibility of the Immigration and Naturalization Service. Although, under this system Immigration Judges do, in fact, exercise independent, impartial judgement, two problems persist. The first is the perception that Immigration Judges cannot be impartial if they come within Service control, because the Service, at least in its deportation and exclusion function, is an enforcement agency. Secondly, it makes Immigration Judges dependent on the Service for administrative support. In some districts this relationship works well; in others, there are problems with priorities established by district directors. The Department is giving serious consideration to establishing a more independent Immigration Judge system. I would suggest that the Immigration Judges remain in the administrative law process, as this would avoid an immigration law system which is overly formal and legalistic. The administrative adjudication of deportability or excludability can and does work.

I would be happy to answer any questions the Subcommittee may have.

Senator SIMPSON. Thank you very much.
Judge Roberts, please.

**STATEMENT OF MAURICE A. ROBERTS, FORMER CHIEF JUDGE,
BOARD OF IMMIGRATION APPEALS, AND EDITOR, INTERPRET-
ER RELEASES**

Judge ROBERTS. Thank you, Mr. Chairman, for this opportunity of appearing here.

My name is Maurice A. Roberts. I am editor of Interpreter Releases, an information service published weekly on immigration and nationality matters. It is published by the American Council for Nationalities Service, one of the voluntary agencies which you mentioned earlier, Mr. Chairman.

The views I express here, today, however, are entirely my own, and not necessarily either those of Interpreter Releases or the American Council for Nationalities Service.

Mr. Chairman, I have been involved continuously in immigration and nationality matters for over 40 years. Before I became editor of Interpreter Releases 7 years ago, I was Chairman of the Board of Immigration Appeals for a number of years, and before that I was in charge of litigation under the immigration laws in the Criminal Division of the Department of Justice for a number of years. Before that, for 14 years, I was in the Immigration Service in various capacities, including naturalization examiner, investigator, chief of adjudications, assistant chief of investigations, and deputy general counsel.

Senator SIMPSON. You know what hell is.

Judge ROBERTS. I mention this, Mr. Chairman, merely to state that I am aware of the problems confronting the Service, the Department, the courts, and the proposal that I have put before your subcommittee is an attempt to reconcile the conflicting needs of both the aliens and citizens involved and good law enforcement.

I do not have a prepared statement because of time limitations. However, I have presented to your subcommittee copies of an article that I recently prepared, and which was published in the San Diego Law Review, and with your permission, I would like to offer this for inclusion in the record.

Senator SIMPSON. Without objection.

Judge ROBERTS. My proposal is premised on the conclusion that the present system simply is not working, and I think that what the preceding witnesses have testified to bears that out. There seems little, shall I say, argument that there is need for a change, and it seems to me that the big question is what is the direction of the change.

My proposal relates essentially to the most important decisions in the immigration field, those in exclusion and deportation proceedings. There are many, many others that are important, but these are the ones that are tried in a trial type hearing before immigration judges, and at present there is an appeal to the Board of Immigration Appeals; thereafter, opportunity for review in the Court of Appeals. And in this connection, Mr. Chairman, I was struck by your reference to the fact that in the field of immigration law there is almost undue opportunity for delay. I would merely

like to comment on the fact that back in 1961 when the present judicial review procedure was enacted, section 106(a) was put into the Immigration and Nationality Act, that was triggered in large part by the case of Carlos Marcello who had been ordered deported, and his deportation order was affirmed by the U.S. Supreme Court in 1955, and he was still here in 1961, and at that time he was called before one of the committees, took the fifth amendment about 50 times, and his case came to attention, and I think that helped trigger section 106(a).

Well, it is now 20 years later and Carlos Marcello is still here. I think that sort of underscores what you said before.

The bill that I have proposed—and by the way, it is not at all original. As you know, the Select Commission later came through with the same recommendation, and my proposal is based in a large measure on what I read at the Select Commission. It is designed to free the immigration judges and the Board from any outside influences, and to streamline the procedure, if you will. From what has been stated previously, it is very apparent that the immigration judges need help. They should be taken out from under the Immigration Service and put into an independent body. In my estimation, the appropriate place for them to be is with the Board of Immigration Appeals in a structure which is completely outside the Department of Justice.

I am not wedded to the idea of an immigration court. I mean, it is not the only alternative. In my estimation, it is the best solution, and for these reasons: At the present time, the Board of Immigration Appeals as an administrative body may not rule on constitutional issues, and these abound. Its decisions are reviewed in the courts of appeals, many of which differ from circuit to circuit. And so the Board has to apply one rule in one circuit and another rule in the rest of the country or in a different circuit. It seems to me that there should be uniformity of decision to the extent possible.

Now, the proposal for an Article I court would guarantee a due process trial before an impartial and competent judge, which is what a defendant in a criminal case gets today. There would be an appeal to an impartial and competent board, and that would be it except for Supreme Court review. It would eliminate layering of review. It would expedite final disposition of hearings, and in my estimation, should be seriously considered.

Thank you.

[The article submitted by Judge Roberts follows:]

Proposed: A Specialized Statutory Immigration Court

MAURICE A. ROBERTS*

The retired Chairman of the Board of Immigration Appeals examines the mechanisms for formal adjudication of excludability and deportability under our immigration and nationality laws. Analyzing the shortcomings which contribute to the system's malfunctioning, he concludes that a prime factor is the conflicting roles played by the Immigration and Naturalization Service. After reviewing various alternative structures which would remove such determinations from Service control, Mr. Roberts proposes a tribunal completely outside the Department of Justice—a specialized statutory article I immigration court, with trial and appellate divisions—and presents a draft of a statute to create it.

INTRODUCTION

Some years ago, in an article devoted to an examination of the increasingly important role and the expanded needs of the Board of Immigration Appeals (BIA), I concluded with a recommendation that the Board should be given statutory recognition and a more realistic salary classification, and that its members should be Presidential appointees confirmed by the Senate.¹ Recently confronted with a request to draft a bill to effectuate that recommendation, I find that intervening developments require a somewhat more expansive approach to the problem.

The Board, after all, merely writes the last act, administratively, in a drama that had its beginnings long before the case reached that tribunal. In the most important proceedings coming before the Board for adjudication, those involving the exclusion and ex-

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1. See Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 43-44 (1977).

pulsion of aliens, the charges have been laid, the issues framed, the evidence presented and the adjudication made in a trial before an immigration judge.² It is his³ decision, based on the record made before him, that the BIA reviews. Recent disclosures, made before the Select Commission on Immigration and Refugee Policy⁴ and elsewhere, present a picture that casts grave doubt on the adequacy of the entire structure. I am now satisfied that it would be futile to concentrate only on the Board when the overall system itself seems badly in need of reappraisal and overhaul.

It will be the purpose of this article to analyze the existing mechanisms for formal adjudication of excludability and deportability under our immigration and nationality laws, examine their shortcomings, and present feasible alternatives.

THE EXISTING SYSTEM

It is becoming increasingly apparent that the present system of decision-making under the immigration and nationality laws simply isn't working. This malfunction is due, in part, to the frequently conflicting roles which must be played by the Immigration and Naturalization Service (INS), the agency charged by the statute with the bulk of the decision-making.⁵ For one thing, the statutory provisions themselves are exceedingly technical and complex, and become increasingly so. From simple beginnings, the statutory grounds for exclusion and deportation have multiplied and proliferated through the years, followed at intervals by provisions for discretionary amelioration when the full sweep of the hardship involved has been exposed.⁶ The result is

2. The statute itself refers to these officials as *special inquiry officers*. Immigration and Nationality Act §§ 101(b)(4), 235, 236, 242, 8 U.S.C. §§ 1101(b)(4), 1225, 1226, 1252 (1976). They are now called immigration judges, 8 C.F.R. § 1.1(1) (1980), and will be so referred to throughout this article.

3. It is easier to refer to "his" than to "his or her," and the use of the masculine form in referring to an immigration judge should be taken as also including the feminine. Some immigration judges are women.

4. The Select Commission on Immigration and Refugee Policy (hereinafter the Select Commission) was created pursuant to the Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907 (1978), to study and evaluate existing laws, policies and procedures governing the admission of immigrants and refugees to the United States and to make administrative and legislative recommendations to the President and the Congress. The sixteen-member commission and its staff have held numerous public hearings and consultations in various parts of the United States. Its final report is due by March 1, 1981.

5. Immigration and Nationality Act § 103, 8 U.S.C. § 1103 (1976); 8 C.F.R. § 2.1 (1980).

6. See Roberts, *The Grounds of Deportation, Statute of Limitations on Deportation, and Clarification of the Nature of Deportation*, 57 INTERPRETER RELEASES 157 (1980).

a melange of mandates for making decisions which sometimes casts the Service in the role of prosecutor, sometimes in the role of judge, and sometimes, alas, in both roles at the same time.

The Immigration and Nationality Act abounds with provisions for exclusion, deportation, and the imposition of penalties, both civil⁷ and criminal.⁸ These, plus the responsibility for policing the borders, involve the Service in functions which are essentially of an enforcement and prosecutorial nature. The bulk of the Service's personnel are engaged in enforcement activities of this nature.

In juxtaposition stand the many statutory provisions authorizing various benefits and forms of relief for citizens and aliens, which bring into play the public service functions of the INS. Typical are the provisions for the grant of exemptions and preferences in the issuance of immigrant visas, based on family reunification,⁹ business needs,¹⁰ and humanitarian concerns for refugees and those seeking asylum here.¹¹ Finally, there are the numerous provisions for waivers of inadmissibility and relief from deportation which frequently confront the INS with the need for making decisions in cases involving a combination of both its enforcement and its service functions.¹²

Coupled with the difficulties inherent in such a dual role is the

7. The grounds for exclusion are stated in Immigration and Nationality Act § 212(a), 8 U.S.C. § 1182(a) (1976 & Supp. III 1979); for deportation, in § 241(a), 8 U.S.C. § 1251(a) (1976 & Supp. III 1979). Civil penalties of an administrative nature are prescribed in Immigration and Nationality Act §§ 231, 233, 237, 239, 243, 251, 254, 255, 256, 271, 272, 273, 8 U.S.C. §§ 1221, 1223, 1227, 1229, 1281, 1284, 1285, 1286, 1321, 1322, 1323 (1976), 1253 (1976, Supp. III 1979 & Supp. IV 1980).

8. Criminal violations are spelled out in Immigration and Nationality Act §§ 266, 274, 275, 276, 277, 278, 8 U.S.C. §§ 1306, 1325, 1326, 1327, 1328 (1976), 1324 (1976 & Supp. III 1979), as well as in various provisions of the Criminal Code, 18 U.S.C. §§ 371 (conspiracy), 911 (false claim to United States citizenship), 1001 (false statements to government officers), 1546 (falsification or misuse of entry documents), 1621 (perjury) (1976).

9. Immigration and Nationality Act §§ 201(b), 202(b), 203, 204, 8 U.S.C. §§ 1151(b), 1152(b) (1976), 1153, 1154 (1976 & Supp. III 1979).

10. Immigration and Nationality Act §§ 101(a)(15)(E), (H), 203(a)(3), (6), 204, 8 U.S.C. §§ 1101(a)(15)(E), (H) (1976), 1153(a)(3), (6) (1976 & Supp. III 1979), 1154 (Supp. III 1979).

11. Immigration and Nationality Act §§ 207, 208, 209, 243(h), 8 U.S.C. §§ 1157, 1158, 1159, 1253(h) (Supp. IV 1980), as amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

12. Immigration and Nationality Act §§ 211(b), 212(b), (c), (d), (e), (g), (h), (i), (j), 213, 244, 245, 248, 249, 8 U.S.C. §§ 1181(b) (1976), 1182(b), (c), (d), (e), (g), (h), (i), (j) (1976 & Supp. III 1979), 1183 (1976), 1254 (1976 & Supp. III 1979), 1255, 1258, 1259 (1976).

undeniable fact that Congress has provided the Service with little real support in carrying out its conflicting and sometimes irreconcilable duties. For example, in the Act, as enacted in 1952, and in the patchwork of amendments which followed,¹³ Congress has reflected no clear immigration policy. This failure has made it necessary for the Service (and the BIA on appeal) to improvise and make ad hoc determinations, shifting positions from time to time as best seemed to suit the needs of the moment.¹⁴ The most dramatic evidence of the congressional failure to provide a clear immigration policy is the fact that in recent years the INS has not been given resources adequate to cope with the proliferating

13. Since enactment of the basic Immigration and Nationality Act in 1952, significant amendments have been made (singly or in batches) in 1953, 1954, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1966, 1970, 1976, 1977, 1978, 1979 and 1980.

14. Illustrative is the administrative position with respect to out-of-wedlock children as stepchildren. The precise question is whether and under what circumstances an alien's illegitimate child can be considered the stepchild of his spouse. The problem arose because under Immigration and Nationality Act § 101(b)(1)(D), 8 U.S.C. § 1101(b)(1)(D) (1976), an illegitimate child can claim or confer immigration benefits only in relation to its natural mother and not in relation to its natural father. This discrimination has been sustained by the Supreme Court. *Fiallo v. Bell*, 430 U.S. 787 (1977). A remedy was fashioned years ago in *Nation v. Esperdy*, 239 F. Supp. 531 (S.D.N.Y. 1965), where the court recognized the spouse of the natural father as the child's stepmother within the meaning of Immigration and Nationality Act § 101(b)(1)(B), 8 U.S.C. § 1101(b)(1)(B) (1976), when the three had lived together in a close family unit. The Service did not appeal that decision and the BIA accepted it as a rule of general applicability, over Service objection. *In re The*, 11 I. & N. Dec. 449 (1965). However, when the same court in *Andrade v. Esperdy*, 270 F. Supp. 516 (S.D.N.Y. 1967), extended the *Nation* rule to a situation where there had never been a close family unit, the Board balked and refused to apply that holding in cases outside the jurisdiction of the court that rendered it. *In re Harris*, I.D. No. 2308 (1974); *In re Amado and Monteiro*, 13 I. & N. Dec. 179 (1969); *In re Soares*, 12 I. & N. Dec. 653 (1968).

After a number of years had passed without any further court ruling on the issue, the INS changed its position. In a memorandum dated December 11, 1978, in *In re Moreira*, File No. A 22 211 458 (Dec. 11, 1978), the Service recommended to the BIA that the *Andrade* rule should be applied nationwide. Without committing itself, the Board in an unreported order dated January 5, 1979, remanded the case to the INS for reconsideration in light of the new Service position. 56 INTERPRETER RELEASES 12 (1979). Both the Service and counsel sought reconsideration, urging the Board to overrule its prior precedents to the contrary (which are binding on the Service) and come out with a new precedent decision accepting the *Andrade* formulation. In the interim, another court in an unpublished opinion had endorsed *Andrade*. *Hyppolite v. Sweeney*, Civ. No. 77-1865 (S.D. Fla. Jan. 6, 1979), reported in 56 INTERPRETER RELEASES 62 (1979). The Board's response was its published precedent decisions in *In re Moreira [Moreira I]*, I.D. No. 2720 (1979), and *In re Moreira [Moreira II]*, I.D. No. 2792 (1980), in which, far from accepting the INS position, it placed a new gloss on *Andrade*. The Service codified the new *Moreira* standards in an amendment to its regulations, 8 C.F.R. § 204.2(c)(3), (5), 45 Fed. Reg. 41392 (1980). Since then, however, the first court of appeals to consider the issue has rejected the Board's new gloss on the meaning of "stepchild" in *Moreira I* and has endorsed the holdings in *Andrade* and *Hyppolite*. See *Palmer v. Reddy*, 622 F.2d 463 (9th Cir. 1980). The Board at first applied that ruling only in cases arising in the Ninth Circuit, *In re Bonnette*, I.D. No. 2840 (1980), but has now accepted it nationwide, *In re McMillan*, I.D. No. 2844 (1981).

problems engendered in both its enforcement and service functions. The study now in process by the Select Commission should yield some meaningful policy guidelines for congressional consideration. But unless Congress provides sufficient funding to carry out the policies seemingly manifest in its legislation, it is a fair inference that Congress does not really intend those policies to be carried out. Effective administration of the laws, whether by way of enforcement or the delivery of services, cannot thrive under such conditions.

Some of the fault may properly be attributed to indifference on the part of the Service's parent organization, the United States Department of Justice. Although the INS has been part of that Department for forty years, departmental interest has been focused largely on components with greater "sex appeal,"—the F.B.I., the Antitrust Division and the Criminal Division, for example. Until relatively recently, when the subject matter of its problems became more newsworthy (undocumented aliens, Iranian students, refugees), the INS has been afflicted with a severe case of benign neglect. I very much doubt that any Attorney General in recent years would have suffered a real feeling of loss if the immigration function were taken out of the Department of Justice and assigned to some other agency of the government.

The inadequacy of INS resources to meet both its enforcement and its public service responsibilities has caused unwarranted backlogs in both areas as emphasis has shifted from time to time between both functions.¹⁵ This enforcement/service dichotomy has only aggravated an already bad situation and intensified serious morale problems within the INS as competing groups become more polarized. The enforcement-minded District Directors now have their own employee organization. The more quasi-judicial and service-oriented immigration judges have theirs. The interplay between the two groups is revealing.

15. Thus, late in 1974, following the onset of the recession and the allegations that millions of aliens were here illegally and were depriving United States citizens and lawfully resident aliens of jobs, the then INS Commissioner reordered Service priorities, with increased emphasis on enforcement functions and diminished emphasis on service functions. 51 INTERPRETER RELEASES 278 (1974); 52 INTERPRETER RELEASES 62 (1975). With a new administration and a new INS Commissioner, as well as a change in the economic situation, greater resources were shifted to the delivery of services. 54 INTERPRETER RELEASES 310 (1977); 55 INTERPRETER RELEASES 73 (1978); 56 INTERPRETER RELEASES 462 (1979).

The District Directors

The INS is headed by the Commissioner of Immigration and Naturalization, who functions from its Central Office in Washington, D.C.¹⁶ Administratively, the INS field service is broken down into four regions, each headed by a Regional Commissioner. Each region is further broken down into a number of districts, each headed by a District Director. It is at the District Office level that the bulk of the Service's activity takes place;¹⁷ there, applications are filed, investigations conducted, adjudications made, inspections of arriving aliens performed and deportation proceedings begun. The District Director bears responsibility for all such Service functions in his district and most Service decisions are made by, or in the name of, its District Directors.¹⁸ Some decisions of District Directors are appealable to the Regional Commissioners.¹⁹ Others are appealable to the BIA.²⁰ Still others are not subject to appeal, but the denied application may be renewed before an immigration judge in later deportation proceedings.²¹ Some decisions are not subject to further administrative review and may be further challenged only by resort to the courts.²² It is the District Directors who determine, in the exercise of prosecutorial discretion, whether a deportation proceeding shall be initiated and prosecuted to a conclusion.²³

That the District Directors are imbued with enforcement fervor should not be surprising. As one commentator put it:

The internal structure and promotional plans of the Service foster the divergent philosophies of law enforcement and service. Border Patrol Agents become Investigators, become Supervisors, become top Administrators including District Directors. Naturalization Examiners become Trial Attorneys, become Special Inquiry Officers or "Judges." While such a system certainly produces some checks and balances it pits one school against another.²⁴

16. Immigration and Nationality Act § 103(b), 8 U.S.C. § 1103(b) (1976); 8 C.F.R. § 2.1 (1980). Since the resignation of Commissioner Leonel J. Castillo in September 1979, there has been a vacancy. During that period INS General Counsel David L. Crosland has served as Acting Commissioner.

17. The Service's uniformed Border Patrol, though functioning on a field office level, has a separate field organization. 8 C.F.R. § 103.1(r) (1980). Border Patrol sector headquarters and stations are listed in 8 C.F.R. § 100.4(d) (1980).

18. The jurisdiction of District Directors is set forth in 8 C.F.R. § 103.1(n) (1980).

19. See 8 C.F.R. § 103.1(m) (1980).

20. See 8 C.F.R. § 3.1(b) (1980).

21. See, e.g., 8 C.F.R. §§ 245.2(a)(4), (d), 249.2 (1980).

22. See, e.g., 8 C.F.R. § 244.2 (1980).

23. *Lopez-Telles v. INS*, 564 F.2d 1302 (9th Cir. 1977); *In re Vizcarra-Delgadillo*, 13 I. & N. Dec. 51 (1968).

24. U.S. COMMISSION ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR* 41 (1980) (Bruce D. Beaudin, consultant).

The Immigration Judges

The INS decisions having greatest immediate impact are those involving the exclusion of aliens seeking admission to the United States and those involving the expulsion of aliens already within this country, many of whom have long years of residence and deep roots here. Decisions of this sort are made by the Service's immigration judges after trial-type hearings designed to accord with current concepts of due process.²⁵

The Service has made tremendous advances since the old days when exclusion and deportation proceedings were summary affairs, conducted by officers who were neither lawyers nor legally trained. Exclusion hearings were held before a Board of Special Inquiry, consisting of three members, one of whom was invariably a clerk who recorded the proceedings. Deportation proceedings were conducted before a presiding inspector, usually an Immigrant Inspector, who combined prosecutorial and quasi-judicial functions and might even be the person who had investigated the case, assembled the evidence, and recommended the initiation of the deportation proceedings.²⁶ Responding to criticism contained in the report of the Wickersham Commission in 1931²⁷ and the Secretary of Labor's Committee on Administrative Procedure in 1939,²⁸ serious attempts at separation of functions were made once the Service was transferred to the Department of Justice in 1940.²⁹

It was not until the enactment of the Administrative Procedure Act in 1946³⁰ and the Supreme Court's 1950 decision in *Wong Yang Sung v. McGrath*,³¹ however, that the need for truly independent hearing officers was brought squarely home to the Service. In *Wong Yang Sung*, the Court held that the Administra-

25. Immigration and Nationality Act §§ 236, 242(b), 8 U.S.C. §§ 1226, 1252(b) (1976); 8 C.F.R. §§ 236, 242 (1980).

26. A good description of the former procedure in deportation cases is set forth in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36-45 (1950).

27. WICKERSHAM COMMISSION, REPORT ON THE ENFORCEMENT OF THE DEPORTATION LAWS OF THE UNITED STATES 162 (1931).

28. The INS was then part of the Department of Labor. THE SECRETARY OF LABOR'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, THE IMMIGRATION AND NATURALIZATION SERVICE 101 (1940).

29. Reorg. Plan No. 5 of 1940, 5 Fed. Reg. 2,223 (1940).

30. The Administrative Procedure Act is now codified in 5 U.S.C. §§ 551-706 (1976 & Supp. III 1979).

31. 339 U.S. 33 (1950).

tive Procedure Act's hearing provisions applied to deportation proceedings and that the Service was not exempt from the requirement that such hearings be conducted by Administrative Procedure Act hearing examiners. The Service succeeded in stampeding Congress into exempting exclusion and deportation proceedings from the Administrative Procedure Act's hearings requirements by insisting that effective immigration law enforcement would otherwise break down. However, the lesson of *Wong Yang Sung*, that the Constitution requires a hearing before a tribunal "which meets at least currently prevailing standards of impartiality,"³² had been learned. When the Immigration and Nationality Act was enacted in 1952, its deportation hearing provisions contained sufficient built-in protections to be ultimately sustained as providing the functional equivalent of the Administrative Procedure Act safeguards.³³

The immigration judges are now all lawyers selected through civil service procedures from among candidates who either have or acquire civil service status. They are now, and have been for years, classified for pay purposes in grade GS-15, with a theoretical salary range of \$44,547 to \$57,912.³⁴ They have endeavored, with some success, to achieve the added stature and trappings of their role models in the judicial branch of government. They wear robes, refer to their tribunal as the "immigration court," and are in theory relatively free from undue influence by the District Directors and other enforcement officials in their decision-making.

When it comes to the realities, however, the immigration judges are far from free. Despite their semi-autonomous status, they are directly dependent on the District Directors, and indirectly on the Regional Commissioners, for office space, hearing facilities, equipment, supplies, clerical and transcription support, interpreter service, travel authorization and reimbursement, library and research facilities, calendars, maintenance of case files, and other services. In determining what portion of their limited resources they can afford to allocate to the needs of the immigration judges, the District Directors are subject to a number of influences which tend to depreciate the importance of those needs.

For one thing, in many areas there is hostility and suspicion between the District Directors and their enforcement officers on the one hand, and the immigration judges on the other. Many District Directors evidently view the immigration judges as pushy intrud-

32. *Id.* at 50.

33. *Marcello v. Bonds*, 349 U.S. 302 (1955).

34. The range is theoretical because Congress has imposed a flat limit of \$50,112.50.

ers whose demands in the name of due process only obstruct the Service mission. Thus, a memorandum by the Association of Immigration Directors of its December 14, 1977 conference with then INS Commissioner Castillo contemptuously refers to the robes of the immigration judges as the "black nightgowns they frequently wear when conducting hearings," and states:

Special Inquiry Officers, aka "Immigration Judges" (8 CFR 1.1(1)) and the evolution of the complicated hearings function by rule making particularly since issuance of 8 CFR 1.1(1) on April 4, 1973, which made use of the term judge permissible [sic] in lieu of special inquiry officer. It was pointed out that no individual change added to SIO authority to veto decisional authority historically exercised [sic] by DIDIR's was, in itself, of major significance, but that in the aggregate the many changes had resulted in creation of a complex legal bureaucracy [sic] that hindered Service mission accomplishment, increased costs and was of more benefit to the legal trade than to the aliens.³⁵

This unflattering perception of the immigration judges by many District Directors is further confirmed by the following testimony delivered before the Select Commission in April 1980 on behalf of the Association of Immigration Directors:

The need for economy and efficiency in the delivery of public service dictates a review of the statutory basis, if any, for the costly and inefficient system of so-called "Immigration Courts" and "Immigration Judges" that seems to have been dictated by the cry for due process . . . [T]he system as it has developed over the past decade particularly, has gone from a relatively simple but complete "lay" hearing to a most complex legal bureaucracy [sic] serving only to confuse and make it costly to the aliens and the government in the process.³⁶

These antagonistic attitudes are not lost on the immigration judges. "It is now clear," one immigration judge wrote to the Select Commission, "that these Directors and their subordinates view our role as renegade Immigration Officers who are usurpers of authority and frauds in our role as Judges. When one understands that this is their position, one can understand the whyfor [sic] of these many manifestations of disrespect toward us."³⁷ Letters to the Select Commission from immigration judges in different parts of the United States relate various types of provocative meddling on the part of enforcement personnel into their operations. "Fair and impartial hearings are not possible," reported another immigration judge to the Select Commission,

35. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, IMMIGRATION HEARINGS AND APPEALS: A STRUCTURAL STUDY 2 (1980) (unpublished report by Peter Levinson on file with the Select Commission).

36. *Id.* at 2-3.

37. *Id.* at 3-4.

"when one of the parties in each case controls the court system." He further asserted that "[t]he strong desire to influence the judges directly or indirectly is repugnantly clear."³⁸

Added to these attitudinal factors, malicious or subconscious, which might make a District Director feel righteously justified in restricting to a bare minimum the resources made available to immigration judges, is the undoubted element of self-interest. When it comes to the allocation of budgetary resources for the processing of deportation cases, the District Directors and the immigration judges have different perceptions of the priorities. As the former Chief Immigration Judge testified:

First of all, the district director is a law enforcement officer, and as such, when he institutes proceedings against an alien, he is interested in seeing that it is carried through to a successful conclusion; otherwise he would not have instituted the proceedings in the beginning. The immigration judge, on the other hand, takes no stand either way, either for the Service or for the alien.

Secondly, the priorities arise because the district director has no responsibility for the immigration judge's activity. If the immigration judge's activity is very successful, the district director gets no credit. If it is unsuccessful, if it is very poor, he gets no blame. So, on the other hand, if his investigative staff does a poor job, he gets blamed for that. If his adjudicators fall behind, he will get complaints from Members of Congress and from members of the public.³⁹

Apart from the petty annoyances and inconveniences to immigration judges inadequately provisioned by the District Directors, such a lack of needed resources can directly impede the entire deportation process. For example, absence of the clerical support needed to transcribe a deportation hearing automatically delays the decision in many cases. Immigration judges ordinarily deliver an oral decision at the end of the hearing. However, if the case is such that a printed form order cannot be used,⁴⁰ the oral decision must be transcribed. In cases having large records or complex legal issues, an immigration judge may reserve decision and await a transcript of the hearing before formulating his opinion. In such cases, lack of clerical facilities is an obvious obstacle to prompt disposition of pending cases.

Where there is no appeal from an immigration judge's decision, there is usually no need to transcribe the hearings. However, where there is an appeal to the BIA, ordinarily the hearing is transcribed before the record on appeal is transmitted to the Board. Since there is an automatic stay of deportation pending

38. *Id.* at 4.

39. U.S. COMMISSION ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR* 110-11 (1980) (statement of Herman Bookford, Chief Immigration Judge).

40. Summary decisions on printed form orders are authorized in some instances by 8 C.F.R. § 242.18(b) (1980).

the appeal,⁴¹ delay in transcribing the hearing necessarily causes delay in the ultimate consideration and disposition of the appeal. As far back as 1972, the BIA noted the acute clerical shortage in some INS districts and the opportunities available to obtain substantial delay in frivolous cases by the simple expedient of filing an ingeniously contrived notice of appeal.⁴² The Board suggested administrative shortcuts, including the possibility of dispensing with the transcript in appropriate cases. When there is a dispute between the immigration judge and the District Director as to whether a record on appeal should be transcribed, the District Director's control of the clerical resources determines the result, at least until the Board intervenes.⁴³ But even in the absence of an appeal, clerical help is needed to transcribe an immigration judge's oral opinion or to type his written decision.

The situation is further complicated by the absence of an appropriate conduit for the provisioning and support of the immigration judges. True, administrative regulations provide for a Chief Immigration Judge in the INS headquarters office in Washington, D.C., who is charged with the general supervision and direction of the immigration judges and with scheduling the various proceedings assigned to them.⁴⁴ But even that small degree of support is no longer available. The last Chief Immigration Judge retired over a year ago and the vacancy has not been filled. Instead, over the objections of the National Association of United States Immigration Judges, the immigration judges have been placed under the administrative supervision of the INS Regional Commissioners.

It is high time that the adjudication of exclusion and deportation proceedings be removed entirely from the Service. The adjudicators, by whatever name they are called, should be placed in a position where they can hear and decide the cases fairly and promptly, free from dependence on and influence by enforcement

41. 8 C.F.R. § 3.6 (1980).

42. *In re Gamboa*, 14 I. & N. Dec. 244 (1972); see also *In re Lopez*, 14 I. & N. Dec. 424 (1973).

43. See, e.g., *In re Holani*, I.D. No. 2804 (1980), in which an appeal from an immigration judge's exclusion order was frustrated for over a year by the District Director's refusal to accede to the immigration judge's request for transcription of the hearing and his oral decision. The BIA remanded for completion of the record without deciding the merits.

44. 8 C.F.R. 103.1(f) (1980).

officials.⁴⁵

The Board of Immigration Appeals

Very little has changed at the Board in the three years since I made my critical analysis in these pages.⁴⁶ The Board has been removed from the administrative supervision of the Deputy Attorney General and placed under the supervision of the Associate Attorney General.⁴⁷ Physically, it has been transplanted from the District of Columbia to nearby Fairfax County, Virginia. It is still, however, only the creature of regulation, lacking statutory recognition or status. It is still dependent on the Department of Justice for staffing, housing and provisioning. Its members are still classified in grade GS-15 and its Chairman in grade GS-16. It is still theoretically independent of the influence of enforcement officials in its decision-making, but in that regard a small cloud has recently appeared.⁴⁸

45. The Service's insensitivity to the needs of the adjudicatory process as opposed to enforcement needs is nowhere better illustrated than in its indifference to the dissemination of precedent-setting decisions. Both the Service and the BIA, within their respective jurisdictions, make adjudications which are administratively final. Selected opinions, designed to be both informative and binding as precedents, are from time to time designated for publication. Provision for designation of INS decisions as precedent is contained in 8 C.F.R. § 103.3(e) (1980). BIA decisions are covered by 8 C.F.R. § 3.1(g) (1980). Publication is provided for in 8 C.F.R. § 103.9(a) (1980). These decisions appear initially in slip form as serially numbered Interim Decisions and are ultimately published in bound volumes entitled *Administrative Decisions Under Immigration and Nationality Laws of the United States* (I. & N. Dec.). The decisions are followed carefully, not only by INS and BIA personnel, but also by other government agencies and private practitioners who must keep abreast of such developments. Until recently, the Service had responsibility for actual publication of these precedent-setting decisions. It failed abysmally, largely through niggardliness in making adequate resources available. Finally, this responsibility was removed from the Service and entrusted to the BIA. Volume 16 of the Decisions, the first one chargeable to the BIA, has recently been published. Meanwhile, Volume 15, which is still the Service's responsibility and should contain Interim Decisions 2301 through 2525, designated for publication as precedents during the period 1974-1976, has yet to make its appearance. To make matters worse, even in the publication of the slip opinions themselves the Service has been guilty of unexplained delay. Interim Decisions Nos. 2757 through 2774, important Service precedent decisions dated from August 26, 1977 to January 18, 1980, were not printed and distributed until the summer of 1980.

46. See Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29 (1977).

47. 8 C.F.R. § 3.1(a), as amended, 45 Fed. Reg. 9893 (1980).

48. In *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the Court held that under the regulations the Attorney General cannot dictate the actions of the BIA. Following that decision, the Attorney General, in Order 45-54 of April 23, 1954, directed the Board and all other subordinates of the Attorney General to exercise their own independent judgment in deciding cases, and to exercise discretion "on the basis of their own understanding and conscience directed by the facts of each individual case, uninfluenced by any extraneous statements by persons official or unofficial." 1 C. GORDON & H. ROSENFIELD, *IMMIGRATION LAW AND PROCEDURE* 1-79

Apart from its lack of statutory recognition, a number of additional disadvantages inherent in the Board's present posture have recently come to the fore. These must be seriously addressed in any critical appraisal of the Board. For instance, no longer do the majority of Board cases originate on the eastern seaboard. The center of gravity has shifted sharply. Immigration cases now spring up in profusion all over the country, and immigration practitioners may now be found not only in the large centers of population on both coasts but also in the Midwest. The opportunity for ready access to the Board for oral argument on the part of practitioners outside the Washington, D.C. area is becoming a real need which the Board, as now constituted, cannot fill.

Moreover, constitutional challenges to the immigration and nationality laws, to which the Supreme Court has recently opened the door a chink,⁴⁹ may not be entertained by the Board. The Board has consistently held that it lacks power to adjudicate such issues.⁵⁰ Even more important, the Board's role as final administrative arbiter in settling all questions of law on a national level has been seriously undermined in recent years by sectional differences among the courts on review of Board decisions. The Board

n.68 (rev. ed. 1980). Recently, in *In re Sandoval*, I.D. No. 2725 (1979), the Board departed from its prior course of decisions and held that the exclusionary rule does not apply in deportation proceedings because they are civil in nature. Dissenting in part, Board Member Appleman made the following disquieting point:

The rule having been accepted and followed for so many years, the natural inquiry is—what reason is there for a change now? The majority decision fails to answer this satisfactorily. The Service has advanced no argument for a change beyond mere reliance on the civil nature of deportation proceedings, and advice that, according to a memorandum of the Associate Attorney General, the Department of Justice is adopting, generally, the rule which the Service is now urging upon us. We, of course, are not bound by the enunciation of position of the Associate Attorney General. See *U.S. ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

49. The Supreme Court has consistently held that in legislating on the classes of aliens who may enter and remain in the United States, Congress exercises political judgment which is immune from judicial scrutiny. Recently, however, the Court stated: "Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens. . . ." *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977). No case was cited for this proposition. In *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), the court construed Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1976), as providing relief for aliens who had not departed from the United States, on the theory that to do otherwise would render the provision vulnerable as a denial of equal protection.

50. *In re Cortez*, 16 I. & N. Dec. 289 (1977); *In re Chery and Hassan*, I.D. No. 2405 (1975); *In re Lennon*, I.D. No. 2304 (1974); *In re Wong*, 13 I. & N. Dec. 820 (1971); *In re Santana*, 13 I. & N. Dec. 362 (1969).

has consistently held⁵¹ that it is bound to apply the rule of law laid down by the court in future cases arising within the territorial jurisdiction of that court. As issues of this nature proliferate, we are being increasingly confronted with situations in which the Board applies one rule in one geographical area and another rule in the rest of the country.⁵²

Judicial Review

In recent years, the availability, form, and scope of judicial review have played an increasingly important role in the direction of immigration law enforcement. Not only do the courts' developing concepts of due process affect immigration procedures,⁵³ their construction of the substantive provisions of the statutes themselves has had a marked effect on the direction the law has taken.⁵⁴

Because judicial review provides a ready avenue of additional delay, the Immigration and Nationality Act was amended in 1961 to add section 106(a) providing a statutory form for review of final deportation orders. This provision was designed to streamline the mechanics of review by eliminating access to the district courts altogether. Petitions for review are now filed directly in the courts of appeals. But not all BIA decisions are thus reviewable. In deportation cases, habeas corpus in the district court is still preserved for the alien under official restraint,⁵⁵ and for aliens ordered excluded it is the sole remedy.⁵⁶ Moreover, Board deci-

51. And rightly so, in my estimation. See *Ithaca College v. N.L.R.B.*, 623 F.2d 224 (2d Cir. 1980), and cases cited therein.

52. See, e.g., *In re Bonnette*, I.D. No. 2840 (1980); *In re Bowe*, I.D. No. 2819 (1980); *In re Fulgencio*, I.D. No. 2816 (1980); *In re Cienfuegos*, I.D. No. 2746 (1979); *In re Kim*, I.D. No. 2735 (1979); *In re Anwo*, 16 I. & N. Dec. 293 (1977); *In re Gonzalez*, 16 I. & N. Dec. 134 (1977); *In re Amado and Monteiro*, 13 I. & N. Dec. 179 (1969). Cf. *In re Mangabat*, 14 I. & N. Dec. 75 (1972) (Board's jurisdiction is nationwide and a contrary ruling of a lower federal court is not necessarily dispositive).

An additional critical comment on the Board should be noted in passing. One immigration judge, who formerly, as the BIA Chairman's Executive Assistant/Chief Attorney Examiner, also served as Alternate Board Member, has recently questioned both the Board's independence and its competence. He has recommended that the Board be abolished altogether, and that the immigration judge's decision be the final administrative decision, subject to further review only in the courts. I cannot agree with this recommendation. In view of the diversity of views among the 40 immigration judges scattered throughout the United States, there is a real need for an appellate body such as the Board to harmonize conflicting positions and provide uniform authority nationwide. At the same time, the nature of that tribunal (whether it is in the form of a statutory Board or other structure) should be such as to overcome the deficiencies noted by this critic.

53. See, e.g., *United States v. Rangel-Gonzales*, 617 F.2d 1349 (9th Cir. 1980).

54. E.g., *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976).

55. Immigration and Nationality Act § 106(a)(9), 8 U.S.C. § 1105a(a)(9) (1976).

56. Immigration and Nationality Act § 106(b), 8 U.S.C. § 1105a(b) (1976).

sions on visa petitions, not being final orders of deportation, are still reviewable in the district courts in actions for declaratory judgments.⁵⁷ So also are determinations affecting deportability made outside the deportation proceedings before the immigration judge.⁵⁸

The long-sought elimination of delay by the streamlining of the judicial review process is not yet at hand. This failure may be attributable, in part at least, to the mounting tide of civil litigation of all sorts now confronting the federal courts.⁵⁹ In part, it is due to the increasing complexity of the immigration laws and of the issues, factual and legal, that must now be dealt with.

Need for a Change

It seems clear that there is an urgent need for some fundamental changes in the system. Delay is built into the existing structure.⁶⁰ District Directors give low priority to the needs of the immigration judges. The resultant lack of adequate facilities delays hearings and chronic clerical shortages delay transcripts and opinions. The layering of review, administrative and judicial, and the multiplicity of opportunities for review open the door to additional delay.

When it comes to the administrative decision-makers themselves, the immigration judges and the BIA members, the ques-

57. *Beltre v. Kiley*, 470 F. Supp. 87 (S.D.N.Y. 1979), *aff'd per curiam*, 614 F.2d 1285 (2d Cir. 1980).

58. *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968).

59. The overloaded condition of the federal courts is a matter of such common knowledge that no citation of authorities should be necessary. To meet this mounting problem, additional judges have been provided, elimination of diversity jurisdiction is in process, and many innovative ideas are under study. See Hufstedler & Nejelski, *A.B.A. Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A. J. 965 (1980).

60. It should not be supposed that delay is in the best interests of the subject of the proceedings. Delay as an end in itself can hardly be justified. It is understandable that an alien who is clearly deportable and ineligible for any relief from deportation should want to defer his enforced departure as long as possible, but that can hardly warrant resort to procedures which are purely dilatory. On the other hand, undue delay can be prejudicial to many persons who must deal with the INS. The United States citizen or permanent resident alien who files a visa petition for a close relative abroad is adversely affected by the delay. So is the transnational corporation seeking to bring in executive personnel from abroad. So is the alien here who is seeking, either within or outside deportation proceedings, to adjust his status to that of a permanent resident, which will enable him not only to confer preference benefits on close relatives abroad but also to proceed toward ultimate naturalization.

tion arises whether the time has not come to make changes in the method of their selection and their placement in an essentially enforcement agency. Should immigration judges continue to be recruited almost exclusively from INS personnel with largely prosecutorial and enforcement backgrounds? In view of the growing tension between the immigration judges and the District Directors, shouldn't the immigration judges be completely removed from the INS? And in view of the apparent indifference of the Department of Justice in immigration matters generally, isn't it time to consider moving both the immigration judges and the Board into an environment better adapted to their needs?

SOME ALTERNATIVES

In considering any alternatives to the present system, the weaknesses now exposed in the existing apparatus must be taken into account. To function effectively, any replacement mechanism must be designed to achieve the following objectives: (1) *Qualified personnel*. The salary structure and tenure of office should be in keeping with the great responsibilities involved. The present scale of compensation for both immigration judges and BIA members is wholly out of proportion. The level should be raised to the point needed to attract and keep lawyers with the high qualifications required for both the trial and appellate functions. (2) *Independence*. The adjudicators must be completely separated organizationally from enforcement officials, so that their independence from prosecutorial influence, direct or indirect, is not only actual but perceived to be so.⁶¹ Public confidence in the fairness of the system will be undermined by anything less. (3) *Adequate support*. The adjudicators must not only receive the support services needed for prompt decision-making, but must also be in a position organizationally to compete effectively for adequate budgets.

The Administrative Procedure Act

One suggested solution would be to amend the Immigration

61. As one commentator aptly put it:

I think it is very much advisable, not only from the standpoint of carrying out the work efficiently, but from the standpoint of a public view of the operation. We must not only be independent but we must, I think, give the appearance of independence. We must convince the aliens, the public, the members of the bar that our decisions are independent, and when we are so closely allied with and a part of the Immigration Service, it's very difficult to convince these people that we are indeed independent.

U.S. COMMISSION ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR* 111 (1980) (quoting Herman Bookford, Chief Immigration Judge).

and Nationality Act to require that hearings and decisions in exclusion and deportation cases be committed to administrative law judges appointed in accordance with the Administrative Procedure Act. Administrative law judges are now widely employed in the federal establishment. Over a thousand administrative law judges attached to various federal agencies now carry out quasi-judicial functions. A more demanding selection and screening process is applied to candidates for administrative law judge positions and those selected have greater job security than immigration judges. Their compensation, promotion and tenure would not depend on the approval of INS enforcement officials and, in view of the high level of the responsibilities involved, the pay level assigned by the Office of Administrative Law Judges would probably be set at grade GS-16. Undoubtedly, greater independence from pressures by INS enforcement officials in their decision-making would be achieved by administrative law judges and a higher calibre of adjudication could be expected since the more exacting administrative law judge standards could be expected to screen out immigration judges whose present performance is marginal or less. However, if the administrative law judges remained within the INS and depended on the INS for provisioning and support, the present intolerable situation would remain. The only alternative would be to remove the administrative law judges from the INS entirely and attach them to another entity within or outside the Department of Justice.

A New Independent Statutory Agency

Another alternative would be to create a new independent statutory agency within the Department of Justice on the model of the United States Parole Commission. The immigration judges could be placed within this agency, thereby removing them from the influence of and dependence on INS enforcement officials. The BIA could be included within the new agency as an appellate body, thereby giving it statutory recognition and greater stature while at the same time removing it from direct control by the Attorney General. The judges of this new tribunal, both trial and appellate levels, could be appointed by the President and confirmed by the Senate for fixed and staggered terms of, say, six years. Appointments should be made at higher grades: GS-18 for the appellate level and GS-17 for the trial level. This upgrading

would help to attract better-qualified applicants. Such a new agency would be a marked improvement over the present set-up.

At the same time, certain disadvantages would still remain. The new agency, with functions entirely adjudicatory, would still be part of the Department of Justice, which is essentially an enforcement entity. As an administrative tribunal, the new agency could not adjudicate constitutional challenges to the governing statutes or regulations, any more than the BIA now can. In addition, the final decisions of the new agency, being administrative, would still be subject to further review in the courts. This would not only continue the present opportunities for delay but would still permit different results in different localities when the reviewing courts disagreed.

A New Statutory Immigration Court

It seems to me that the best solution to the problem of the proper placement of the functions now performed by immigration judges and the BIA would be to transfer both trial and appellate functions to a new specialized article I court. The change would not be very drastic. The work now performed by immigration judges is essentially judicial. They already conduct due process hearings comparable in most respects to judicial hearings. The Federal Rules of Evidence and the Federal Rules of Civil Procedure would not apply. Rules of the new court could conform the practice to the needs of this specialized field of law, eliminate unnecessary features and streamline procedures. Immigration judges already make final decisions in the cases coming before them, as distinguished from the merely recommended decisions made in most cases presided over by administrative law judges.

Moreover, the issues that now arise in deportation and exclusion cases are precisely the sort that have been traditionally entrusted to the courts. Although the proceedings themselves are technically civil in nature, the courts are sensitive to the fact that what is actually at stake is the freedom of an individual. Issues of much less consequence to the parties are commonly accepted as appropriate for judicial resolution. The jealously-guarded separation of functions principle makes for a judicial tradition of independence that renders courts less likely than other agencies of government to yield to political pressures. This is especially true with respect to aliens, whom the courts have recently come to recognize as a politically powerless minority.

The appellate division of the new court could perform all the appellate functions now committed to the BIA and would have many additional advantages. For example, it could determine

constitutional issues, which the BIA may not do.⁶² With adequate staffing, it could permit oral argument in all parts of the country before roving panels of the court. Having nationwide jurisdiction, it could apply its decisions uniformly all over the country. If its decisions were made subject to further review only by the United States Supreme Court on certiorari, this would not only eliminate an additional layer of review but would close the door to different rules being applied in different parts of the country as a result of conflicting holdings in the courts of appeals.

Set forth in the Appendix is the draft of a bill to create a United States Immigration Court.⁶³ Judges of the court would be appointed by the President and confirmed by the Senate for fixed terms of fifteen years and at compensation comparable to that of other federal judges. This change should help to attract the best qualified candidates and a screening panel to make recommendations to the President could be suggested. While there is no provision for "grandfathering in" the present immigration judges and BIA members, many undoubtedly would be found qualified for the new court.

The rules of the new court could be expected to continue those attributes of the present practice which have proved their worth through the years. Various non-attorney specialists, found qualified to appear for the nonprofit voluntary agencies long active in this field, have been permitted to practice before immigration judges and the BIA under the rules of the Board. The rules of the new court would continue this practice.

As drafted, the jurisdiction of the trial division is restricted to the types of cases now heard by immigration judges: those requiring an opportunity for trial-type hearing, such as exclusion, deportation and rescission of adjustment. The jurisdiction of the appellate division is restricted to the types of cases now committed to the BIA, which include not only appeals from immigration judges but also from District Directors in a limited number of areas. Additional types of cases could later be added to the court's jurisdiction in the light of experience. Adjudications made by the INS in proceedings not requiring trial-type hearings, on applica-

62. *Palmore v. United States*, 411 U.S. 389 (1973).

63. The bill is modeled after, and elaborates upon, one drafted by Peter Levinson and submitted to the Select Commission staff in an unpublished memorandum dated August 18, 1980. A much more detailed and intricate draft bill had been submitted on behalf of the organization of immigration judges.

tions not renewable in trial-type proceedings before the trial judges of the new court, could be made directly appealable to the court's appellate division. The naturalization function, now reposed in the United States district courts and selected state courts, could be transferred to the trial division.

A court of this type would afford the litigants, alien and citizen alike, a fair trial before a competent tribunal qualified to dispense justice and exercise discretion without undue influence from the enforcement officials. Any aggrieved party would have an appeal as of right to a competent and independent appellate tribunal. There should be little, if any, need for further judicial review. While some may argue that such a specialized court tends ultimately to identify with the enforcement agency, and that opportunity for review by a court of generalist judges is imperative, this need not be. If the judges of the new court are carefully and conscientiously selected, their judgments should be sufficient guarantee of justice and equity.

Elimination of further review, save for certiorari in the Supreme Court, would have a number of benefits. It would ease the burden of the existing courts without diluting the quality of the decisions. It would make for speedier disposition of cases and help eliminate backlogs. It would establish uniformity of decision throughout the United States. And further review would be uncalled for by the underlying system of independent, competent and compassionate judges.

APPENDIX

UNITED STATES IMMIGRATION COURT

Section 1. *Establishment of court.* There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Immigration Court. The United States Immigration Court shall consist of an appellate division, composed of seven members (including the chief judge), and a trial division, composed of fifty members (including the chief judge). The chief judge and judges of the appellate division and the chief judge and judges of the trial division shall be appointed by the President, by and with the advice and consent of the Senate, for terms of fifteen years. Judges of the United States Immigration Court shall be appointed solely on the basis of fitness to perform the duties of the office.

Section 2. *Compensation of judges.* Each judge of the appellate division shall receive salary at the same rate and in the same installments as judges of the district courts of the United States. Each judge of the trial division shall receive salary at the same rate and in the same installments as commissioners of the United States Court of Claims.

Section 3. *Removal of judges.* Judges of the United States Immigration Court may be removed by the President during their terms of office only for incompetency, misconduct in office, neglect of duty, or physical or mental disability. Before any order of removal is entered by the President, he shall furnish a full specification of the charges to the judge, who shall be accorded an opportunity to be heard on the charges by a panel of three judges to be selected by the Chief Justice of the United States from among the senior judges of three different circuits of the United States Court of Appeals.

Section 4. *Rules of court.* The appellate division shall promulgate rules of court governing practice and procedure in the appellate division and in the trial division. The rules shall be designed to accord all parties to proceedings in the trial division and in the appellate division a fair and prompt hearing and determination. To this end, neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure shall apply to proceedings in the United States Immigration Court. However, selected provisions of those Rules may be adapted and incorporated, as deemed appropriate, in the rules of the United States Immigration Court.

The rules shall contain provisions for the representation of non-government parties in proceedings before the court by counsel of their own choice without expense to the government, as well as by qualified nonattorneys who appear without fee or as accredited representatives of nonprofit voluntary agencies of a religious, charitable, social service or similar nature recognized by the court as having at its disposal adequate knowledge, information and experience.

Section 5. *Appellate division administration.* The chief judge of the appellate division shall have administrative responsibility for the proper functioning of the appellate division and shall have power to appoint such administrative assistants, attorneys, clerks, and other personnel as may be needed for that purpose. In accordance with the rules of the court, the chief judge may either designate any three appellate division judges to hear and decide any case within the jurisdiction of the appellate division or may refer any such case to the appellate division en banc. A judge of the trial division, pursuant to designation of the chief judge of the appellate division in accordance with rules of the court, may sit temporarily in place of a judge of the appellate division. The appellate division shall have its headquarters office in Washington, D.C. and shall hear oral argument there in accordance with its rules. From time to time, at such intervals as may be deemed appropriate in the judgment of the chief judge of the appellate division, a panel or panels of three judges of the appellate division may travel to other areas of the United States outside the headquarters office for the purpose of hearing oral argument in cases arising in those areas.

Section 6. *Appellate division jurisdiction.* The appellate division shall have jurisdiction to hear and determine appeals from final decisions of judges of the trial division. The appellate division shall also have jurisdiction to hear and determine appeals from final decisions of the Immigration and Naturalization Service in the following types of proceedings: (1) administrative fines and penalties under sections 231, 233, 237, 239, 243, 251, 254, 255, 256, 271, 272, and 273 of the Immigration and Nationality Act; (2) applications for the exercise of the discretionary authority contained in section 212(c) and section 212(d)(3) of the Immigration and Nationality Act; and (3) applications for classification as immediate relatives under section 201(b) of the Immigration and Nationality Act and for preference classification under section 203(a) of the Immigration and Nationality Act. The appellate division shall also have power to direct that any determination of a judge of the trial division or of the Immigration and Naturaliza-

tion Service within the appellate jurisdiction of the appellate division be certified to it for review and final determination. In considering and determining cases before it, the appellate division shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for a just and equitable disposition of the case.

Section 7. Trial division administration. The chief judge of the trial division shall have administrative responsibility for the proper functioning of the trial division and shall have power to appoint such administrative assistants, attorneys, clerks and other personnel as may be needed for that purpose. In accordance with the rules of the court, the chief judge of the trial division may designate any trial division judge to hear and decide any case falling within the jurisdiction of the trial division.

Section 8. Trial division jurisdiction. The trial division shall have jurisdiction to hear and determine the following types of cases: (1) exclusion cases under section 236 of the Immigration and Nationality Act; (2) deportation cases under section 242 of the Immigration and Nationality Act; and (3) rescission of adjustment of status cases under section 246 of the Immigration and Nationality Act. In considering and determining cases coming before them, the trial division judges shall determine all applications for discretionary relief which may properly be raised in the proceedings, including determinations relating to bond, parole or detention of an alien in such proceedings, and shall exercise such discretion conferred upon the Attorney General by law as is appropriate for the just and equitable disposition of the case.

Section 9. Savings provisions. The enactment of this Act shall not result in any loss of rights or powers, interruption of jurisdiction, or prejudice to matters pending in the Board of Immigration Appeals or before special inquiry officers (immigration judges) on the day that this Act shall take effect. Under rules to be promulgated by the appellate division, with respect to such pending cases the appellate division shall be deemed to be a continuation of the Board of Immigration Appeals and the trial division shall be deemed to be a continuation of special inquiry officers (immigration judges) for the purpose of effectuating the continuation of all existing rights, powers, and jurisdiction. Pending promulgation of those rules, the Board of Immigration Appeals and the special inquiry officers (immigration judges) shall continue to

function with such jurisdiction and powers as exist on the day that this Act is enacted.

Section 10. *Finality of decision.* A final decision of the appellate division shall be binding on all judges of the trial division and on all officers of the United States, and shall be subject to further review only by the Supreme Court of the United States on petition for certiorari.

Senator SIMPSON. Thank you very much. Thank you, sir. Next, Judge Farb, please.

STATEMENT OF RALPH FARB, FORMER MEMBER, BOARD OF IMMIGRATION APPEALS

Judge FARB. Mr. Chairman, I, too, thank you for the opportunity to come here.

I have prepared a written statement, and I ask that it be made part of the record.

Senator SIMPSON. It will be included in the record.

Judge FARB. I observe that neither in anything that has been written, nor in anything that has been said today is there any suggestion that the problem of independence of the immigration judges and of the Board of Immigration Appeals is not a serious one. In my written remarks I have suggested that for a number of years the immigration judges enjoyed actual, de facto independence because the Immigration Service protected them without there being any legal impediment to interference, but that recently there have been some indications that the Immigration Service would like to hold them in with a closer rein.

As for the Board of Immigration Appeals, the very fact that members serve only at the pleasure of the Attorney General may lead in some circumstances to the suspicion that the Board is an instrument of the will of the Attorney General in a particular case.

So independence in the form of legislation is desirable, because it is just as important that the public perceive that these bodies are independent as that they be actually independent.

The more controversial portion of today's subjects is the question of the immigration court, the two-tiered immigration court suggested by the Select Commission. I oppose putting immigration judges in an immigration court with salaries equivalent to those of U.S. district judges primarily because I feel that there is something important in the administrative process that would be lost by this kind of action. Even though they are adjudicators, immigration judges of some years' experience develop an expertise in this labyrinthine field which is invaluable. Granted, there are problems with the present group of immigration judges as to their quality. Some of them are excellent, as I have said in my report, and some of them not so good, and when the change comes, whatever it is, whether they be made administrative law judges under the Administrative Procedures Act, or whether they be made members of the immigration court, some of these should be kept and some of them should be dropped.

If you make it an immigration court, and you make the salary as attractive as the Select Commission has suggested, even the best of our present group of immigration judges are likely to fail to be acceptable for Presidential recommendation because of the well known fact that there are patronage considerations when this type of appointment occurs.

Therefore, I lean in favor of making them administrative law judges under the Administrative Procedures Act.

And there is the further point that, as Judge Monsanto says, there is a problem of taking care of the immigration judge pro-

gram, scheduling, productivity and so on. I, with all respect to Judge Monsanto, I do not believe that one person can do the whole thing. In my personal experience I was a supervisor of the program in a region of 11 States, and that was a full time job, acting under the supervision of the chief special inquiry officer in Washington.

There has to be some kind of peer relationship between the person who supervises and the immigration judges or they will not respect his suggestions, but at the same time, he cannot do everything from Washington, and he cannot be running around all the time and really know what is going on. Therefore, he has to have some help, and the organization which I contemplate would have its base in the Board of Immigration Appeals or in the Service, if you like, but under the control of the Board of Immigration Appeals.

My big problem as far as money is concerned is that the support system for a completely independent trial bench in the immigration court would be a terrible waste. This is a continuous process, and the borrowing of interpreters, of stenographers, of vehicles to go from place to place is something that saves a lot of money to the Government.

There are a couple of things that were said this morning that I would like to comment on. I think I would like to point out that the immigration judge is not accountable to the District Director. There is some suggestion that he second guesses the District Director in his adjudication. He is not accountable to the District Director for anything more than reporting how much mileage he put on the Government car last month and to turn out the lights at night. The District Director has to provide him with services, and that is where the rub comes in when there is a shortage of services in the whole district. That is where these tensions arise, when each side cannot consider that the other one's requirements are reasonable.

The biggest problem is transcription time, and I think that there is room for action without going into legislation. I think that is something that can be done internally. But when you talk about delays, Mr. Chairman, the biggest delay comes from the fact that the immigration judge usually has to do his own recording electronically, and sometimes this is a poor recording, and then an appeal is taken and it takes forever for the record to be transcribed and get to the court. I can perceive that in the very near future the development of electronic devices will permit some revolutions in this area that will help out the problem.

Thank you.

[The prepared statement of Judge Farb follows:]

PREPARED STATEMENT OF RALPH FARB

Mr. Chairman, there is a need for legislation to make immigration judges (IJs) free from interference by the Immigration and Naturalization Service (INS). Half a dozen years ago I would have said that while IJs were apparently vulnerable to interference they were in fact independent. I have a different opinion now.

I have been a close observer of the IJ scene since 1942 when I conducted my first deportation hearing. Since then I have conducted hearings, supervised the program in two regions, and as an attorney in the General Counsel's office and until my retirement as a member of the Board of Immigration Appeals (BIA) I have examined many records of hearings. My active participation ended last year.

I assume that no one needs convincing today that IJs should be able to conduct hearings and issue decisions with complete freedom from influence by INS executives. They have enjoyed that freedom under a sort of gentlemen's agreement from about 1950 until recently. After obtaining a Congressional exemption from the Administrative Procedure Act (APA) hearing procedures in 1950, INS treated its hearing officers with the same respect they had enjoyed during their brief six months under that Act. The Supreme Court's decision in the Accardi case in 1954 (347 U.S. 260; see also 349 U.S. 280) resulting in the issuance of a document by the Attorney General (AG) directing the BIA to exercise its independent judgment in cases without regard to any public utterances

he might have made to the effect that the subject was an undesirable alien. The AG wrote a similar memorandum at the same time concerning special inquiry officers (SIOs).

INS fell from grace one year later. Annoyed at an "incorrect" decision favoring another notorious alien named Brancato, INS at the Central Office (CO) level subjected the SIO to a humiliating interrogation and removed him from his position. Immediately the House Immigration Subcommittee embarrassed INS by investigating and publishing a report. After that IJs enjoyed total freedom in fact. The CO never developed a procedure for dealing with official actions which might deserve reaction. They avoided confrontation.

Lately, however, INS has been stirring. In 1980 at the height of the Iranian hostage crisis, INS issued numerous nervous directives concerning Iranians in the U.S. One was a directive to IJs setting a brief absolute limit on the length of departure time an IJ decision might allow. 8 C.F.R. 244.1; 45 F.R. 27917; 4/25/80. Last month another regulation was issued, with the official pretext of defining lines of authority more precisely, stripping IJs of authority to require INS to assign a trial attorney to a deportation hearing. 8 C.F.R. 242.9(b); 46 F.R. 43995; 9/2/81.

The latter rule is particularly bad because its author apparently has overlooked that the IJ has no direct access to an alien's file and that occasions arise when it appears that a material document is in the file. There is no more expeditious way of getting ahead with the hearing than the one which has just been prohibited. Of course, due process will be preserved if some official outside the case chooses to cooperate with the IJ.

There have also been rumors, unverified, of more serious instances of a new aggressive stance by INS.

Concerning the independence of the BIA, the situation is clearer. Members of the Board, unlike IJs who have civil service status, serve at the pleasure of the AG. Board members should be able to cast their votes without considering whether the AG may disapprove. Providing that they be appointed to 15-year terms is an adequate solution.

Upgrading the IJs and the Board members as to salary level is desirable, in order to increase the pool of highly qualified candidates. I agree with the observation of the Select Commission that the INS selection system is unsatisfactory. There have been some selections of poor judges.

I disagree with the Select Commission's proposal that IJs should be replaced with judges of an Article I immigration court, for several reasons. The upgrading of quality and status can be accomplished by replacing them with administrative law judges (ALJs) appointed under the APA by the Office of Personnel Management. There are some excellent judges in the present ranks, and they would have a chance to prove they should retain their jobs. With a court consisting of judges with exalted government salaries, the first criterion for selection would be the strength of each candidate's political credentials. Let's not throw the baby out with the bath water.

The Select Commission also suggests that putting trial judges in an Article I court will cure the evil of leaving them dependent on the administrative officials "whose judgments are being reviewed." I don't understand the last five words. Nor do I agree with the use of the expression "dependence." IJs "depend" on district directors for space, clerical assistance, travel expenses and the like. It is precisely because the district director, otherwise lord of all he surveys, is reduced to the role of servant that he sometimes speaks unkindly of the IJ (who sometimes is arrogant enough to deserve unkind comment). Though there is always this undercurrent of resentment, it is not a sufficient reason for erecting a costly parallel support system,

complete with interpreters. The economical way, to share support facilities with the INS, is clearly better. As for friction, in the past when funds were not so scarce, good program management minimized it. Scarcity of resources is an aggravating factor. It is not incurable. A costly new empire is not the only answer.

The Select Commission seeks to justify replacement of IJs with judges of a statutory court on the ground that many ALJs perform a combination of quasijudicial and quasilegislative functions whereas the acts of IJs are solely quasijudicial. This is an astonishing distortion of the intent of the APA. As the report entitled Administrative Procedure Act, Legislative History, Senate Document No. 248, 79th Congress, 2d Session, July 26, 1946 reveals, it was precisely the intent of the Act to embrace different kinds of administrative operations within a single statute. On the floor of the House on May 24, 1946, Representative Walter stated:

The second kind of administrative operation is found in those familiar situations in which an officer or agency determines the particular case just as in other fields of law the courts determine cases. . . . What the agencies do in these cases is to determine, just as a court might determine, the liability of a party or the redress to which a party is entitled in a specific case on a specific state of facts and under stated law. (S. Doc. 248, p. 353.)

The Select Commission is not interpreting the APA; it is rewriting it.

The most incredible suggestion of the Select Commission is that present delays and backlogs in scheduling of hearings will be cured by the establishment of a trial division of a statutory immigration court. Although I do not know the precise reasons for present backlogs, I am confident that they would be bigger if the proposed court system were in effect. IJs travel frequently and make special efforts to hear cases of detained aliens with the least possible delay. As I picture the proposed court, the judges would probably decline to travel to places where aliens are serving sentences and would want all hearings scheduled centrally.

The deportation hearing program is but a piece of a continuous cooperative process, in the effort to close cases at least as rapidly as new ones arise. The vast majority of hearings are cut-and-dried, with no contest, and with voluntary departure in lieu of deportation the maximum relief available. IJs have developed methods of completing such cases speedily, withall according each alien all his due process rights. As lawyers, when we are inventing a system we tend to assume that the average hearing is a full dress contest. Any system must accommodate

itself to that type of hearing, but it would be unrealistic to set up a court on the assumption that that will be the norm. Do we really expect that the new court would develop similar or better procedures to maximize flexibility and rapidity? More likely, we would witness a stately, dignified, slow "judicial" pace.

The objections I have just expressed regarding an Article I court do not apply to the BIA. The Board acts on a record made below. It employs a professional staff of legal advisers. Except in the matter of passing on stays or motions it cannot be geared up to a decision every ten minutes. In choosing between the two suggested models, a court or a statutory independent body operating within the Department of Justice, my preference would depend on what becomes of IJs. If there will be a trial division of a court, then there should also be an appellate division. If ALJs will be assigned either within INS or outside INS but within the Department, I would favor conversion of the Board to an independent agency.

On balance, I favor leaving ALJs within INS, making the BIA an independent agency within the DOJ, and giving the Board certain responsibilities it does not presently possess, namely, to provide management of the ALJ program down to the field level, also to revise and control the hearing regulations presently controlled by INS, Parts 236 and 242.

Senator SIMPSON. Thank you very much.
Judge de Gaeto.

**STATEMENT OF ANTHONY DE GAETO, PRESIDENT, ASSOCIATION
OF IMMIGRATION JUDGES**

Judge DE GAETO. First I wish to thank this committee to allow our association to address it.

At present, all immigration judges sitting are members of our association. We call upon you to enact legislation at the earliest possible date to remove us from the Immigration and Naturalization Service. We are presently structured within the Immigration Service. We are fully dependent upon them for all our needs. We lack the necessary resources to carry out the function of our hearings. We are denied any protections afforded administrative law judges. Under the present structure we are vulnerable by constant attack that our hearings are tainted because of alleged interference by Service personnel in the conduct of our hearings.

A prime example in support of our removal is the current litigation in the southern district of Florida where the bar has attacked our hearings alleging interference from the General Counsel's office which has raised the spectre of tainted proceedings in violation of the fifth amendment of the Constitution.

This has virtually brought all Haitian hearings to a standstill. The only reason we are subject to this attack is because we are based within the Immigration Service, one of the parties to our proceedings.

This will continue unless we are insulated from the parties being judged. I emphasize that a legislative change to the Immigration Act to remove the immigration judges from the Immigration and Naturalization Service is imperative. Immigration judges operate presently in an atmosphere of crisis. We are required to provide impartial hearings which meet due process standards, but fair and impartial hearings are not possible when one of the parties in the hearing controls the court system.

The Attorney General in 1954 issued a directive, 45-54, directing that immigration judges be accorded independence in their rulings and decisions. This order is not widely known within the Service, and if it is known, is generally disregarded. Direct and indirect pressure is currently brought to bear on the judges by a variety of personnel in the enforcement chain of command. There is general agreement among scholars, lawyers, those who have been in the system, and those who have studied it, that the immigration court should be removed from the Immigration and Naturalization Service and be restructured.

We favor the creation of an independent court under article I containing both a trial and appellate part. A very important advantage of an independent court is that it would be entirely independent of the Justice Department, the agency which gives prosecutorial direction in its cases. Complete removal from the Justice Department is the only way to assure that there can be no interference or pressure applied to the immigration judges. We are not satisfied that any other alternative would completely cure the malady

that now afflicts this hearing process. However, practical consideration requires an alternate solution.

We would endorse secondarily the establishment of a commission under the Administrative Procedure Act, not linked to any existing department or agency of the Government, with trial and appellate part. The decision of the trial judge would be final unless appealed. We cannot accept anything less than the independent commission.

I again wish to thank you for allowing us to address you, and I stand ready to answer any questions.

[The prepared statement of Judge de Gaebro follows:]

PREPARED STATEMENT OF ANTHONY DE GAETO

The cornerstone of the deportation process is the constitutional mandate for a fair hearing. The Courts have approved the legislative formula for administrative determination, but have insisted that the hearings be supported by proceedings which satisfy due process. The original hearing was held by presiding inspectors and adjudicators. He presented evidence, examined and cross-examined witnesses and made the preliminary decision although his original function was only to recommend. The procedural pattern was questioned from time to time, but these criticisms did not result in any important corrective action by either Congress, the Courts or the Administrative officers. In 1950 the Supreme court in Sung v McGrath, 339 U.S. 33, 70 S. Ct 445 held that the Administrative Procedure Act of 1946 was applicable to deportation hearings. In the Immigration and Nationality Act of 1952 Congress prescribed procedures for deportation hearings, and the Supreme Court found that these directives had effectively exempted the hearings from the mandates of the A.P.A. From all this emerged the Immigration Judge.

They are in theory relatively free from undue influence by Service personnel in their decision-making. When it comes to the realities however, the immigration judge is far from free. He is subject to constant interference from law enforcement officials. He lacks control over the administration of his hearings and is denied the needed resources to carry out the function of his hearings. He lacks any of the protections afforded Administrative Law Judges by the A.P.A. As recent as August 14, 1981 it has been proposed that Immigration Judges be subject to annual rating by officers whose allegiance, by necessity, is to the person charged with enforcement of the Immigration and Nationality Act. The interest of the Commissioner of the Immigration and Naturalization Service is to limit the access of aliens to enter or remain in the United States where it is believed that they are not in compliance with, or in violation of, some law which might render them deportable or excludable. This is purely a prosecutorial attitude. The Immigration Judges function is to determine whether or not the Commissioner or his delegate is correct in his determination. The effect of any semblance of control is chilling on the entire judicial process.

The courts have zealously guarded the status of quasi-judges as reflected in Nash v. Califano , CA2 1/7/80; there the court reinforced the ban on performance evaluations and substantive review for Administrative Law Judges. The Supreme Court of the United States has stated that "Congress intended to make hearing examiners (now Administrative Law Judges) a special class of semi-independent subordinate hearing officers by vesting control of their compensation, promotion and tenure in the Civil Service Commission to a greater extent than in the case of other federal employee." Hamspeck v. Federal Trial Examiners Conference , 343 U.S. at 132.

Our function is judicial by nature and at a minimum we are entitled to protection and insulation afforded Administrative Law Judges Wong Yang Sung v. McGrath , 339 U.S. 33 (1950).

Over the recent past, indeed for long as the Immigration Judge has been in existence, there has been a well documented pattern of an attempted influence and interference by Service personnel ranging from General Counsel, Regional Commissioner, District Director and Service personnel.

No matter how well meaning any directive from the Service would be, it could be vulnerable to judicial review and can be destructive to the conduct of impartial immigration proceedings. See Accardi v. Shaughnessy , 374 U.S. 260; Shaughnessy v. Accardi , 349 U.S. 280.

A prime example is the current litigation in the Southern District of Florida where because the alleged interference by the General Counsel's Office in the conduct of the hearings before Immigration Judges a spector has been raised of a tainted proceeding in violation of the Fifth Amendment of the Constitution of the United States. The ideal solution to this very serious and urgent problem is the removal of the entire hearing process from the Department of Justice.

We perceive the same three solutions and endorse the recommendation of Maurice A. Roberts as outlined in his San Diego Law Review article appearing in Vol. 18, November 1, 1980 of the publication.

The Select Commissioner has proposed a similar solution and outlined legislative language for the implementation of its position. In principle we support this concept as well. We believe the most desirable format for an immigration court system would be the proposed Article I Court as basically outlined in the above references publications.

We are not satisfied that any other alternative would completely cure the malady that now afflicts this hearing process, however practical considerations required an alternate solution.

We would indorse secondarily the establishment of a Commission under A.P.A. not linked to any existing department or agency of government with trial and appellate parts. The decisions of the trial judges would be final unless appealed. The independent Commission concept has ample precedent (The Mine Safety and Review Commission). We cannot accept anything less than an independent Commission. The alternative proposal of ALJ system within the Department of Justice is untenable by its very nature the Department of Justice's functions is to investigate and prosecute.

We have provided a system of due process for the protection of material things such as Court of International Trade, Bankruptcy Court, etc. certainly we can do as much to protect the rights of these persons who now walk in the shadows of our society.

Senator SIMPSON. Thank you, sir, very much.
Judge Monsanto—did I say that correctly now?
Judge MONSANTO. It is acceptable.

Senator SIMPSON. Judge Monsanto, as you heard the testimony of Mrs. Meissner, if you did this morning, we asked her about the three organizations within the INS, the Association of Border Enforcement Officers, the district directors, and this association.

Do you feel it is necessary to have that many or that layering process in the INS?

Judge MONSANTO. Insofar as the separation of functions between enforcement and hearings, is this what you mean, Senator?

Senator SIMPSON. Yes.

Judge MONSANTO. Yes, I think there is a necessity for separation from enforcement and service and hearings, as a matter of fact. There are three elements within the Immigration and Naturalization Service that call for individualized adjudication. One is of course the enforcement. The second one is the service, such as the attorneys for the bar were referring to this morning, the visa petitions and so forth, and then the hearing process.

There are three separate and distinct areas within the Service right now, and there are conflicts between those three at the present time. But there is a necessity for distinction, notable distinction between service and enforcement.

Senator SIMPSON. Do you think those two functions should be separated, as some have indicated?

Judge MONSANTO. No, I do not think they should be separated. They could be under one body, of course, but individualized training as to the persons who do the work, whether it is in the service or whether it is in the enforcement so that you do not have overlapping conflicts between the two.

Senator SIMPSON. How do you believe that relations between the adjudication officials and the enforcement officials might be better strengthened in the INS?

Judge MONSANTO. Again, are we referring to my hearing process or are we referring to an adjudication process, because within the Immigration Service we do have that distinction between examiners who adjudicate and the judges, for example, who sit in hearings.

Senator SIMPSON. I think that Ms. Meissner asked that same inquiry. The latter, the judges I am speaking of.

Judge MONSANTO. As far as the judges are concerned, we need to be separated from the enforcement and service part of the Service because we do have overriding interests in the adjudications that we sit, and we as judges are required to be impartial in our determination of the person who is charged with a violation before us. The enforcement people, of course, have an interest in that. The interest is they have arrested the alien, the alien has committed a violation, and they want to see that the alien is punished. That may not necessarily be the case after we have heard all of the testimony, after we have adduced all the evidence and come to a decision.

Thus, we run into conflict with the party who has been the enforcement end of it and who will then take whatever steps are necessary to dilute the decision as it were. That is one example. It works the other way also. When we issue an order, we want to see that order enforced. If I order an alien deported from this country, I do not want to see that alien 3 years hence going up the elevator with me because he is going to file a motion to reopen the case because my order was not followed 3 years ago. Now it is my turn to be angry.

So you can see that there is a constant conflict there between our objectives, no matter which way you look at it.

Senator SIMPSON. I understand that you held a training program or a training session for immigration judges, the first that had been held.

Could you tell me just briefly a bit about that? What was the most significant part of the learning process there in terms of training and the needs and the interests of immigration judges?

Judge MONSANTO. One of the most important things that I see as an immigration judge, chief immigration judge, is to expedite cases, is to come to speedy determinations, and the methodology employed is usually the reason why these cases are not heard and disposed of quickly. Knowing that there is a National Judicial College at the University of Nevada in Reno, I borrowed from them extensively. I sent two—I was successful in having two of our judges go to that school for 2 weeks and be trained there, and then they were the ones that I used as instructors in the school that I started so that the newly appointed judges and those who have been recently appointed who had not yet had any training in this field were the first students who came to our class. There they were taught the methodology, the method by which they ought to employ to expedite cases, to come to speedy conclusion, to get rid of cases as fast as possible because essentially this is what it is all about, speedy justice.

And it has been successful. I have not had a further course because funding is always the drawback.

Senator SIMPSON. But that is where the original information for the training program was developed, from the Reno District Judge School.

Judge MONSANTO. Yes. I sent for all of the information from that school and studied it.

Senator SIMPSON. That is excellent. That is required in the jurisdiction where I used to practice, that they go there. I believe only one or two judges refused to do so in the entire State, but that proved to be very helpful to them.

Judge MONSANTO. In the State of Florida, all judges appointed to the bench are required to attend the course at the National Judicial College.

Senator SIMPSON. What is the significance, as you see it, of the recent standards for evaluation of immigration judges as set by the INS, and how do you feel about that?

Judge MONSANTO. I do not believe the INS should be the party that sets up the evaluation standards, but one of the things I discovered in the National Judicial College is that all judges are evaluated in one manner or another as far as their competency and their ability to perform is concerned. I would not want any cadre of judges performing out in the field who did not come under some system of evaluation to determine whether or not they are complying with what they have been hired to do. This is something that all judges undergo in any system that I know of, and the college stressed that.

Senator SIMPSON. Judge Roberts, a quick reference to the article I court proposal. That has been criticized on the basis of cost.

I would like your views on it, and I know you have strong views on that. The article I court proposal is criticized sometimes as increasing parochialism, and it was felt that when a greater response to the community as a whole was required as through a court of appeals, that there would be a better result.

What is your response to that?

Judge ROBERTS. There is always the danger of parochialism. A lot does depend on the nature and quality of the judges. I see this as a tradeoff actually. You cannot have a perfect system. The present system is imperfect.

I am not an advocate for the Immigration Service, but I see so many opportunities for delay built into the present system, I think the proposal that I have fostered would eliminate a lot of that built-in opportunity for delay. And while there is always the possibility that you would have parochialism, it need not necessarily be. For that matter, Judge Farb mentioned that patronage considerations enter into appointments for judicial posts. I would merely remind the Chair that patronage considerations can enter into appointments to the Board of Immigration Appeals, and believe me, they have, not in every case, but these are the facts of life.

My feeling is that an immigration court properly constituted and planned need not be that expensive. Due process does not necessarily mean delay. It merely means that process which is due, which is appropriate. An immigration court could tailor its rules to the needs of the particular type of proceeding before it. It need not

have the Federal Rules of Civil Procedure or Criminal Procedure, but it could adopt those items which are appropriate to this type of proceeding.

It is a tradeoff. It is not perfect, but I think it is better than anything else.

Senator SIMPSON. But you share Judge Monsanto's view that the great requirement here is speed of deliberation in expediting these cases.

Would the article I course do that better than any other vehicle?

Judge ROBERTS. I think so. For one thing, you merely have a two-layer system. You have a trial. You have one appeal as of right. Beyond that, it is certiorari to the Supreme Court, which I admit is very seldom granted, but the fact is this is what a person gets in a criminal proceeding. I do not know that immigration proceedings require the present layering of review, and there are advantages to having one national body which lays down a rule nationally, and you could have roving panels of judges going out to hear oral argument all over the country, which you do not have now.

Senator SIMPSON. Yes; that was suggested earlier.

Could you comment on the expression or theory that the BIA might be abolished and that all appeals might go from the immigration judge to the court of appeals as envisioned by the statute?

Judge ROBERTS. Yes, I heard that recommendation. I would consider it most unwise. There are 42 immigration judges. I do not say there are 42 points of view on everything, but very often you have diverse positions taken. There is a real need for one body to harmonize the law. There is a need for the lawyers and the public to look to one body for a statement of the law that applies all over the United States. That is what the Board does now.

Senator SIMPSON. Do you think the Board should review all actions of the District Director?

Judge ROBERTS. No. I think that there are so many, many items that really do not require Board review or trials. I mean, so many applications, for example, are handled simply on paper by an examiner, expeditiously. If there is to be review—and I think there should be review—I do not like the thought of any officer arbitrarily taking action which is not subject to review, but I think you could have review within the Service as you have now.

My chief objection to the present system, frankly, is that it was tailored for political purposes. When the regions were set up in 1955, they had to have something to do, and so certain appeals were diverted. I think that the present system of having regional review is unfortunate because they are not properly staffed. I do not think they have lawyers handling this, and so many of the issues are really deep legal issues.

I would recommend, though, that the important types of issues be subject to a review by the Board from the District Directors, as they are now; familial visa petitions are now reviewed by the Board.

Senator SIMPSON. One final question because of your interest in the article I court, title I court. How would that court relate to the district court in terms of habeas corpus review, or to the court of appeals review which is now set out in the INA? How would that

title I court relate to the district court in terms of habeas corpus review?

Judge ROBERTS. First, as I have proposed it, its decisions would be subject to no further review except by the Supreme Court.

Now, I do not know that you could eliminate habeas corpus review altogether because habeas corpus is a constitutional right. Now, I know there have been instances in which a substitute has been provided. I think title 28 United States Code 2255 provides a vehicle for post-conviction determinations, and I think in *Hayman v. United States* it was held that that is an adequate substitute for habeas corpus and takes care of the constitutional question. It could be that if you did have judicial review of this nature, it might—I say this with some doubt—it might be construed as adequate substitution for habeas corpus. But judging by the trend of judicial decision, I doubt it. I think you would still have habeas corpus.

Senator SIMPSON. Perhaps you would, yes.

Judge FARB, do you feel the BIA should review all action of the District Director?

Judge FARB. I do not. I think that there are many actions of the district director which should be reviewed at the central office level because they are the kinds of things which the Board may not be concerned with.

Senator SIMPSON. Would you comment on the concept of a theory that BIA be abolished and all appeals should go from the immigration judge to the court of appeals as envisioned by the statute?

Judge FARB. I agree completely with Judge Roberts' excellent statement on that. No.

Senator SIMPSON. You obviously are a political realist, and you spoke of patronage with regard to judges. That was your comment as I recall.

Judge FARB. Yes, sir.

Senator SIMPSON. And certainly you, too, have added the distinction about the Board, and I am certain that will always be the case. You know, it is something that we might address in the statute. I happened to be a member of the Judiciary Committee when we processed the judges under the omnibus bill, and if I recall—and this is not a nasty little partisanship statement but just a true observation—that one of the things in the previous campaign was that partisanship had never entered the selection of judges in the U.S. Federal judiciary, and when all the shot and shell died, there were 97 percent of them of the particular political faith of the sitting President, which I thought was very interesting.

But now, of course, it is different. We will be just as fair on the other side.

Well, how do you feel, Judge Farb, two things, two further questions. What additional support staff do you believe is necessary for the BIA, and how do you feel the BIA judges should be selected in the future?

Judge FARB. The members of the BIA?

Senator SIMPSON. Yes.

Judge FARB. As far as support staff for the BIA is concerned, in my written statement I was suggesting that the Board or its succes-

sor as an independent entity within the Department control the immigration judge program, and for that, as Judge Milhollan said this morning, the Board is not presently equipped. The Board is satisfactorily equipped to do the work it is doing now, but to supervise the immigration judge program in the field, it would have to acquire a larger management staff and administrative staff.

The second part of your question concerns appointment of Board members. I think that depends on where they are going to be, of course. If they are going to be within the Department of Justice, I suppose they could be appointed by either the Attorney General or by the President, but I favor the idea of giving them lengthy terms such as the 15 years the Select Commission suggested, so there would be no question about a Board member looking over his shoulder at whoever appointed him when he is making a vote on a case.

Senator SIMPSON. One final question of you, sir.

Do you believe that certification to the Attorney General should be restricted or abolished, even though it is used seldom?

Judge FARB. Well, the trouble with certification to the Attorney General today is that it is completely one sided. Either the Board or the Commissioner or sometimes the Attorney General may decide that it is a case for certification, but the private party, the alien has no right to go to the Attorney General, even though he may have an extremely important and novel legal point that he wants to take.

I think it should be abolished.

Senator SIMPSON. Judge de Gaeto, could you just briefly inform me of the goals of your organization, what it is that you hope to obtain as an organization?

Judge DE GAETO. Our goals are that we should be removed from the Immigration Service. We were formed because we felt there was a need that the immigration judges should be heard within the Service. In the past, the immigration judges are treated like a step-child. The enforcement end of the Service feels that we are sort of a roadblock in moving the alien out of the United States, they feel we are there to stop their efforts. We felt there was a need to join together so that we could be heard within the Service.

Senator SIMPSON. How do you feel that relationships between the adjudication officials, judges, and the enforcement officials in the INS might be improved?

Judge DE GAETO. Well, recently we had a meeting with the Commissioner, and at that meeting it was suggested that we submit to her a restructuring of the immigration court within the Service as a stopgap until such time as we were removed.

I have submitted that proposal to her, and what we have suggested in that proposal is that we be made under the Commissioner's office, but be strictly independent of the Service for budget, for service needs and all. At the present time all our personnel—and I use the word very loosely because we do not have personnel—has to be given to us by the District Director. If he chooses to take the secretary away from me, I have no way whatsoever to stop him. If he chooses not to transcribe a record of mine, I have no say whatsoever.

Senator SIMPSON. What do you envision in the long run to be the proper relationship between the immigration judge and the BIA?

Judge DE GAETO. I think there is a need for an additional step after the immigration judge for an appeal. I believe the Board of Immigration Appeals is a good solution. The only objection I have against the Board of Immigration Appeals is that they do take on certain functions which do not make them clearly an appellate body. I think if that was eliminated it would be a very good structure, in other words, from us to the Board of Immigration Appeals or whatever appellate body you want. It is sort of like a stopgap so that everything does not flow into the court of appeals.

Senator SIMPSON. What is your view of the recent evaluation standards of immigration judges as set forth by the INS? How do you feel about that?

Judge DE GAETO. I have very strong view against that. We are not against accountability as much as the Service thinks we are against accountability. We are not against accountability, but we are against accountability by one of the parties to our action. We suggested in the new proposed restructuring, accountability by peer evaluation, by a panel of judges that would be on a rotating basis, and any complaints for accountability would go to this panel of judges.

But it is not proper for the General Counsel or any of his staff to evaluate us when he is one of the parties to our action.

Senator SIMPSON. I sense a frustration as you speak about support staff, if you have any. We have heard the horror stories in your arena that you often have no secretaries, and you have often even been without typewriters.

Is this correct?

Judge DE GAETO. Yes.

Senator SIMPSON. That is correct?

Judge DE GAETO. In New York—and I can only speak for New York, but it is the same throughout the whole United States—in New York we have six sitting judges. We have five clerks that have to support the six judges. No judge has his own personal secretary. We have no transcribers in New York. All our transcription is done in St. Albans, Vt. That means we have to send up to St. Albans, Vt. they transcribe it, they forward it back to us, we correct it, send it back to them, they send it back to us. So there is a built-in delay of many, many months. The attorneys know this. The Service plays right into their hands because the attorneys know that there is a built-in delay on any appeal they take. We have no support personnel whatsoever.

Senator SIMPSON. I am not going to dabble into the mysteries of why the service office or the regional office of New York City is in Vermont, but that is the case, is it not?

Judge DE GAETO. Yes, that is Burlington, Vt.

Senator SIMPSON. There is no politics involved in that?

Judge DE GAETO. I do not think so.

Senator SIMPSON. I thought not. They just happened to have a spot, they had a building available. They decided to put it up there.

That handles New York City.

Judge DE GAETO. New York City at one time was the regional office. Then for some reason not known to me they moved it to

Burlington, Vt. We have all the administration of the office out of Burlington, Vt. except for the District Director. There is a District Director in New York.

Senator SIMPSON. Those are administrative decisions, not statutory. Were they, or were those established by statute?

Judge DE GAETO. I do not know.

Judge ROBERTS. Administrative.

Senator SIMPSON. Well, undoubtedly there will be some shift there, perhaps.

I just really wanted to find out if that was so, that you really did not have the support staff to function, and you are not, you know, in the usual role of an empire builder. You do not even have a start.

Judge DE GAETO. No. I have to do my own research. I write my letters in longhand. I write my decisions in longhand because I have nobody to dictate to.

Senator SIMPSON. Is this true in most other States?

Judge DE GAETO. Most others.

Judge MONSANTO. I can answer that. That is true in all areas, including my own.

Senator SIMPSON. So what do you do in that terrible frustration? Who do you go to without result?

Judge MONSANTO. We do the best we can under the circumstances. We continue to ask.

Senator SIMPSON. Where do they tell you to go other than the usual place?

Judge MONSANTO. I do not want to tell you.

Judge DE GAETO. We make our request to the District Director who then tells us to forward it to the regional office, and then for some reason it gets lost and we go back through the process again.

Senator SIMPSON. That is the way the system works in the United States of America.

Judge DE GAETO. Yes.

Judge MONSANTO. This has been one of my main goals during the time I have acted as chief, to try to get personnel for the judges.

Judge FARB. The last time I was in the system as a supervisory SIO, and they abolished my job, which was to try to work these things out, we told the SIO's, you ask the District Director for what you need, and if his answer does not satisfy you, you go to the deputy regional commissioner, and if his answer does not satisfy you, you go to the chief immigration judge.

Sometime after that the chief immigration judge retired, and his job was left vacant for some years. In the meantime these problems were accumulating, and now we hear some of what is developing.

Senator SIMPSON. Well, I can assure you of one thing. We are not going to have hearings on the internal workings of the INS because I think anyone would take judicial notice of it from top to bottom because that is what we have been aware of for so many years.

Thank you very much. You have been very helpful, and your information has been most provocative.

And I want to commend the staff, both the majority staff, and Dick Day and Arnold Liebowitz, and Minority Staff Director Jerry Tinker for a very capable couple of days of hearings on adjudication procedures. I do not think anything like that had been held before. Even though it is arcane and not very romantic, it is some-

thing at least we have placed upon the record to use as we get into revisions and things that need to be done to make this operation function.

You certainly have obtained a very commendable and excellent selection of witnesses. I have been very impressed by that.

So thank you very much. That will conclude the hearing.

[Whereupon, at 12:32 p.m., the committee recessed subject to the call of the Chair.]

APPENDIX

I, Steven Forester, hereby state as follows:

1. My name is Steven Forester. I am employed by the Haitian Refugee Center, Inc. as an attorney representing indigent Haitian aliens in their exclusion and deportation proceedings.

2. I have been at the Krome-Avenue I.N.S. detention facility representing indigent Haitian aliens detained at that facility on a daily basis, each and every day, since Monday, July 27, 1981, shortly after hearings began there. The facility is an approximately one and one-half hour, sixty (60) mile roundtrip from points of origin in Miami. On behalf of the Haitian Refugee Center, Inc., I and my colleague, Vera Weisz, informed District Director Howerton, other appropriate I.N.S. officials, and each of the four Immigration Judges (Monanto, Nail, Foster, and Scroope) on numerous occasions that it would not be possible for ourselves or for other Center staff to appear at Krome on a regular basis. I informed the Immigration judges of this fact during each of the exclusion hearings I had from March, 1981 until June, 1981 at the downtown Immigration courtrooms at 155 South Miami Avenue in Miami. The Center does not have the requisite financial or manpower resources.

3. I am the only attorney who has been appearing at the Krome Avenue facility to represent indigent Haitian aliens. Private attorneys have months ago informed us and others that they would not be able to appear for indigent Haitians at Krome, and they have not appeared. Legal Services of Greater Miami has told I.N.S. that it cannot appear there more than once per week. So far, they have not appeared, again because of lack of resources, according to them. My colleague, Ms. Weisz, may be able to appear twice per week, but she has not as of this date been able to do so. In short, I have been the only attorney available to provide free legal representation to indigent Haitian aliens detained at Krome.

4. The vast majority of Haitian aliens who have appeared for hearings since Wednesday, July 22, 1981--when hearings at Krome began for Haitians--have requested legal assistance. I appeared in twenty (20) cases on Monday, July 27, 1981; in twelve (12) on Tuesday, July 28, 1981; in eleven (11) on July 29, 1981; and

in eight (8) on July 30, 1981.

During this first week of hearings, I.N.S. had problems locating the Haitians who were scheduled for hearings. These problems seem to have been worked out, however, by Monday, August 3, 1981, on which date I appeared in fifteen (15) cases, and today, Tuesday, August 4, 1981, on which date I appeared in twenty-nine (29) cases.

5. There are three (3) courtrooms at Krome, all of which function simultaneously. Judges Nail, Foster, and Scroope preside. By Thursday, July 30, I had received until August 10 and August 13, 1981 in which to file political asylum applications in thirteen (13) individual cases. I informed the judges that that is an inadequate period of time in which to file one (1) asylum application not to mention the large number which I, as the only attorney representing Haitian aliens at Krome, have to do. In the forty-four (44) cases in which I appeared on yesterday and today, political asylum applications must be filed in forty (40) cases within ten (10) days to two (2) weeks, depending on which Judge presided in the individual case.

6. The simultaneous operation of the three (3) courtrooms was not a major problem when aliens were having their "first hearings," i.e. hearings at which they obtained a continuance to get an attorney, if they so requested. But the simultaneous operation of the courtrooms became a major problem today. I appeared^{ed} as attorney of record in all of the cases heard today. Thus clients of mine were scheduled for hearings simultaneously in three (3) separate locations. Shortly after the hearings began this morning, I informed Judges Nail, Foster, Scroope, and Monsanto that I was requesting that they schedule cases in which I am attorney of record in such a manner that I can be physically present. Judge Monsanto is the chief judge, although he does not preside in the individual hearings. Judges Nail, Foster, and Scroope each informed me that it was my problem if the other judges also had me scheduled, that the case before them would proceed, regardless of whether I was present or not. That is in fact what occurred. I made oral requests, before and during hearings, that the hearings be continued because hearings were proceeding in the two other

courtrooms simultaneously. The judges always denied my requests and proceeded. Even requests for short periods of time, e.g. five (5) or ten (10) minute recesses, were denied. I was forced all day to literally run from one courtroom to another, and from one building (where one of the courtrooms is located) to another (the trailer at the Krome facility where the two (2) other courtrooms are located.) I was not able, physically, to be in three (3) places at once, as I informed the judges. Until today, I have never been denied a continuance because of a scheduling conflict. Four (4) of my clients were ordered excluded and deported, not because their cases lacked merit, but rather because the judges insisted on proceeding in my absence, although each was repeatedly informed that I desired to be present to represent my client. It was purely fortuitous due to my running from building to building that more of my clients were not ordered excluded and deported. In order to try to appear at the other ongoing hearings, I was precluded from filing appropriate motions to effectively represent my clients. It simply was not possible to take the time required for an individual case without having had the two (2) other clients whose hearings were simultaneously ongoing subjected to orders of exclusion and deportation. Very often I rushed into a courtroom long after the hearing had already commenced. Motions to strike and recommence were consistently denied. It was impossible for me, while rushing around, to make proper notes or properly keep my papers in order. The judges did give me "a brief moment" to confer with my client, which was used primarily to run to another courtroom and request a continuance due to the ongoing proceeding in the first courtroom. The requests were always denied, and I was ordered at times not to leave the second courtroom.

7. I.N.S. officers have made it impossible to function at the Krome facility. I am trailed by a security guard wherever I go, including at times into the bathroom. Although I informed the appropriate Immigration officer on numerous occasions, that weekends are the only effective time in which I can

do asylum applications. I was effectively denied access to my clients on Saturday, August 1, 1981. On that date, I was denied access for most of the day for the stated reason that I could not visit with my clients or come into the Krome facility from 8:00 a.m. until 4:00 p.m. because these were "visiting hours". Likewise I could not see my clients from 5:00 p.m. to 6:30 p.m. because it was "feeding time." Finally, I could not see my clients after about 8:00 p.m. because the I.N.S. officers have established a rule that I may not be at the facility after "sundown." Further, it has been my regular experience that, after I.N.S. is informed that I wish to see a client, it takes often up to one (1) hour to have the person brought to the interview from the compound.

7a. On Sunday, Mr. Cecilio Ruiz, the Officer in Charge at Krome, informed me that visiting had been cancelled because of the move of some refugees to Kentucky, and he finally yielded to my entreaties that I be allowed to come earlier than 4:00 p.m. He did not, however, allow me to come in the early morning, which is when I reached him, but rather said that I could come at 1:00 p.m. I did so, and used from that time until 5:00 p.m., when "feeding" began and we were requested to depart the facility, to do asylum applications for two (2) individuals. One was completed and one was partly completed.

8. The Immigration judges and appropriate Immigration officials have been made aware of this problem. They all know that I am in court at Krome from 9:00 a.m. until 4:30 p.m.-- or until the courts adjourn for the day, which may be between 4:00 p.m. and 4:30 p.m. Even during the lunch hour, when the courts are adjourned, noon "feeding" is taking place, and no interviews are possible. In short, I.N.S.

policy has made it impossible for me to interview my clients, not to mention doing the detailed inter-^{view} necessary to prepare an asylum application.

9. I am treated much like a prisoner at Krome. I am not allowed to go anywhere other than to my office or to the courtrooms. Specifically, I am not allowed to go to the trailer, where Haitians awaiting hearings are waiting, to inform them of the availability of free legal services or of their rights. I have been forcibly and physically evicted from the trailer when I attempted to do so. A security guard guards me constantly to make sure that I do not talk to any Haitians other than in my "office." Guards stand constantly outside the office with their walkie-talkies often blaring and they often

enter the room without knocking. There is virtually no privacy to work or to talk with my clients. There is no telephone in the "office," and using a telephone has been a major problem. I have to ask permission to use the telephone each time from Mr. Ruiz, the officer in charge. I have been forced to interrupt suddenly telephone conversations because a security guard told me that he had been instructed that I must leave the compound. Today, I was preparing appeals--which under the regulations must be filed on the day of the hearing in an exclusion proceeding in which an oral order of exclusion and deportation has been issued--in the four (4) cases in which such orders of exclusion and deportation were issued. Immigration guards Hernandez and Llanes, employees of the A.J. Security Company, employed by I.N.S., actually entered my "office" without my permission and in my ^{sence,} ~~ab-~~threw my papers together, mixing them up, and took all of my belongings from the office and put them outside into the hall. They were evicting me and informed me that this was not my "office." I told Mr. Ruiz that under the regulations I had to file the appeals today. He told me that that was too bad and ordered me to leave. I asked him, "Why?" He told me, as he invariably does, that he is the officer in charge and does not need to give reasons. I was then evicted. One appeal was not filed, and the person may consequently be deported from the United States.

10. Unfortunately, I have also been physically harassed,

by the security guards and by Mr. Ruiz. Mr. Ruiz, even though I was walking to the door to leave, following an arbitrary eviction order by him, very forcefully grabbed me by the collar and pulled and pushed me out of the compound. I actually walked by Mr. Howerton as Mr. Ruiz was handling me in this manner, and I asked Mr. Howerton to tell Mr. Ruiz to desist, as I was walking out. Mr. Howerton looked at me and motioned, disgustedly, to Mr. Ruiz, telling him, "Get him out," or words to that effect. This incident occurred at approximately 4:10 p.m. on Thursday, July 30, 1981. Mr. Ruiz forcibly handled me in similar fashion on another day during that week. Today, Mr. Hernandez, during the lunch hour, as I was asking Josie, an employee of the Clerk's office stationed in the trailer where the Clerk of Court at Krome is, for some appeal forms, ordered me to leave. I told him that I was asking Josie for some appeal forms. He thereupon immediately grabbed me with unnecessary and great physical force, and forcibly evicted me from the Clerk's office. I told him that he had no business doing so.

11. There is no effective access to aliens at Krome. As stated, they do not allow myself or my paralegal or assistant to speak with the aliens except in our "office." We, of course, can not ask to see a person unless we file a notice of appearance in the case, which requires at minimum having the person's name. But all persons at Krome strenuously prevent us from getting names of anyone other than persons we already represent. I have repeatedly requested that persons who have first hearings and indicate that they wish legal assistance be brought over to our "office," so that my assistant can interview them. The individual judges state that they have nothing to do with this. Judge Monsanto has said that it is a matter for Mr. Ruiz. (In fact, whenever a decision has to be made involving access or the manner in which we are being treated, etc., I am told that Mr. Ruiz is in charge.) Mr. Ruiz has said that the people will be brought to us. When I ask him, "How?" and "When?", he does not respond, but rather says, "Don't worry, they'll bring them to you." They have never once brought them to us.

12. We are treated abominably even when we request to see a particular client. Today, for instance, my paralegal at 10:20 a.m.

filed G-28s for seven (7) individuals she had to interview. One (1) of these individuals was finally produced after 1:00 p.m. Repeatedly, in response to a request that persons must be seen very soon, I have been told, "as soon as someone is available." My paralegal has been forced to sit idle for hours due to this callous disregard of attorney needs. This has occurred on a regular basis in the last nine (9) days. Asylum applications can't be done.

13. What is worse, my paralegal is treated like a prisoner. She is not allowed to go outside of the room! If she needs to see me to ask me which client she should next interview, she cannot go to the courtroom to see me. She has been told that she cannot go to the bathroom by security guards. She has not been allowed to stand outside the door of the "office" to take a break from work. She has not been allowed to go into the room, just a few feet away, where there are refreshment machines. The "office," with concrete walls and a desk, rather resembles a prison cell, and for my paralegal, it serves as one. There is no excuse for treating her in this manner. The security guard office is directly opposite our "office." All day today, while Marise, my paralegal, was kept in our room, three (3) to six (6) idle security guards lounged around their offices. Usually the number was four (4) to five (5). One of them could easily have escorted her to see me, or wherever she would have to go.

14. In this respect, most importantly, Marise was not allowed to ask Cookie, the person to whom she must give the G-28s for persons we wish to interview, where the people were. After waiting for an hour--and then for two hours, and then for three hours--for clients to be brought, the normal thing to do is to ask the person to whom you delivered the requests where the people are. But Marise was not allowed to go to the reception office to ask this. She was kept inside our "office."

15. On one occasion, while Marise was typing, a security guard came in and told her that she would have to leave the room because another attorney wished to interview a client. We had been told that we would be allowed to have an "office". We also had been told that we would have a telephone in that office, but there is none, and requests to have one installed have not been

honored.

16. It is perhaps impossible to sum up in an affidavit the constant humiliations, both physical and verbal,

which make Krome an impossible place in which to be an attorney representing Haitian clients. One example, however, of treatment by ^{the} Immigration Judges is illustrative.

Appeals, as aforementioned, must be filed on the day an order of exclusion and deportation is orally entered. The appeal must be filed by the end of the day. It must be filed in triplicate. I explained this to Mr. Ruiz and asked him whether I could use --and pay for the use of--the copy machine to make three (3) copies of an appeal form. (This was during lunch, at which time I had only received an order of exclusion and deportation for one client; the other three (3) were after lunch.) He refused; he has never let me use the copy machine, but I asked because I thought that this presented a special, urgent situation. I went to Kathy, an employee of the Clerk's office, and explained to her my difficulty, and also that Judge Nail had suggested I ask whether they would copy it. She made me the copies. That afternoon, I was in court until closing time, approximately 4:30 p.m. I told the judges that I could not complete the forms by the end of the day and asked if I could submit it the following morning. This was refused by Judge Foster. I asked Kathy how long she would be staying. She said only for a few minutes. I asked her whether, if I finished typing the three (3) appeals in time, she would copy them for me. Judge Monsanto was standing there and told her that she could not do that for me. "Oh," Kathy exclaimed, "I didn't know," as if she had committed error by making the three copies in the morning. Judge Monsanto was fully informed by me of the problem with the appeal, but the best suggestion I got from him was that I file with Mr. Ruiz, and two appeals were filed with him. Judge Monsanto informed me, in response to my entreaty about copying the appeal forms, that Kathy was an employee of the Clerk's office, that my office wasn't paying her, and that the Clerk's office would not provide any supplies or assistance to me. Another incident is likewise illustrative of ^{the problem.} In numerous cases today, Judge Foster has given me until Friday, August 14, 1981, at the close of the

business day to file political asylum applications. He and the other judges as a means of expediting the proceedings have set these arbitrary and unrealistic filing dates and have then set hearings for the date they are due, stating that if they are not filed by that date the asylum applications are abandoned. This is exactly the same conduct by the same judges that Judge King in Haitian Refugee Center v. Civiletti found to be illegal.

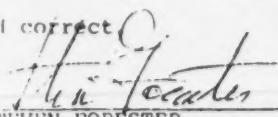
17. Another example of the attitudes at Krome: yesterday, Fed Chaleil, a Haitian alien detained at Krome, was ordered excluded and deported. I saw him only after the hearing, at which time he requested my assistance. I asked to see him last night but was informed that it was "feeding" time and that I must leave the area. I put in a G-28, the attorney representation form, for Mr. Chaleil, and requested to see him, at 9:15 a.m. this morning. He was not brought, although three (3) G-28s requesting him to be brought to us were submitted during the course of the day, during the entire day. I.N.S. officers were informed of the urgency of seeing Mr. Chaleil, but they did not honor this nor respond when asked why he had not been produced. Mr. Chaleil, of course, may have grounds on which to ask for a reopening of his case. One possible ground may be that forms were not provided to him on which he could file an appeal, which appears to be the case. Judge Foster, who entered the order in the case, appeared unsympathetic when informed yesterday of the unavailability of forms and said that he would not give the gentleman until this morning or today, August 4, 1981, to file the appeal form. It is impossible to file a motion to reopen if I cannot interview Mr. Chaleil as to what occurred. All I know at present is that he did request urgently my assistance. I am sure that he would have responded if told, as I have repeatedly requested that the aliens be told when I wish to see them, that the lawyer wishes to see them. I.N.S.' failure to bring him to see me may, for all I know at present, have resulted in his having been deported

today or tonight by airplane to Haiti, or in his imminent deportation. These are all examples of the callous disregard for the rights of Haitian aliens to a fair hearing, to due process of law, and to the effective assistance of counsel, which permeates every aspect of the proceedings at Krome.

18. The Immigration hearing officers deny the effective assistance of counsel in each individual case itself. They deny a continuance at first hearing for attorney preparation of the case even though I have just at that moment filed the G-28 and been retained by the alien, and even though I have not yet had any chance to confer with the alien other than to ascertain that he wishes my assistance. They have refused to permit me to file all written motions with the Court; they have scheduled me to be simultaneously in three (3) courtrooms; and they have expedited deadlines for the filing of asylum applications.

19. I believe that what is occurring at the Krome facility in I.N.S.' "new" exclusion proceedings is a transparent attempt to expeditiously and massively deport Haitian aliens regardless of their rights to a fair hearing, due process, the effective assistance of counsel, and their rights under I.N.S. regulations, statutes, and international obligations. It is the same type of conduct that the Court in Haitian Refugee Center v. Civiletti ordered the Immigration and Naturalization Service to cease and desist.

20. I declare under penalty of perjury on this day of August 4, 1981 that the foregoing is true and correct.


STEVEN FORESTER

I, Steven Forester, hereby state as follows:

1. My name is Steven Forester. I am an attorney employed by the Haitian Refugee Center, Inc. to represent indigent detained Haitian aliens claiming political asylum in the U.S. who otherwise would be without any legal representation whatsoever.

2. On the eight (8) working days from Friday, September 25, 1981 through Friday, October 9, 1981, I was scheduled by the Clerk of the Immigration Court for no less than forty-four (44) political asylum hearings. Most egregious were Monday, October 5, 1981, on which I was scheduled for eight (8) hearings, and Tuesday, October 6, 1981, on which I was scheduled for ten (10) hearings.

3. During most of the entire month of August, 1981, I.N.S. scheduled me to appear in three (3) courtrooms simultaneously, and the hearing officers refused to continue these cases due to these scheduling conflicts. For instance, on August 4, 1981, I ran between three (3) courtrooms to appear in twenty-nine (29) hearings. During this week, I.N.S. has scheduled the two (2) attorneys employed by the Center (Vera Weisz and myself) to be in three (3) courtrooms simultaneously, and has scheduled asylum and preliminary exclusion hearings as massively as aforementioned.

4. Severe I.N.S. access restrictions continue to make effective attorney-client out-of-hearing communication and interviewing nearly impossible. We may not see clients on weekends until 4 p.m. due to the "weekend" rule, during feeding hours (approximately 12:00 noon to 1:00 p.m. and from 5:00 p.m. to 7:00 p.m.) due to the "feeding hours" rule, and after sundown (approximately 7:00 p.m.) due to the "sundown" rule.

5. Twenty-five (25) members of the private Bar in Miami have stated that they would take Haitian cases if hearings were once again held at the downtown Miami I.N.S. courtrooms, where they were held prior to July 22, 1981. The Krome Avenue Detention Facility where hearings are presently held is so far from points of origin in Miami--an approximately one and one-half hour round trip--that significant representation of Haitians by the private Bar has been totally precluded. Our Center, private attorneys, and the Association of Immigration and Nationality Lawyers told District Director Howerton and General Counsel Crossland long before hearings began at Krome, shortly after being informed that hearings would be held there, that

the effect of holding hearings at Krome would be to eliminate involvement by the private Bar for all practical purposes. This has been and remains the case.

6. While I.N.S. effectively precludes participation by other attorneys in this way, I.N.S. guards follow Center attorneys at all times with orders to prevent us from talking with detained Haitian aliens. No telephone has been installed, as was promised; there is no privacy in the "conference room" provided for all attorneys. Treatment of attorneys, especially Center attorneys, by officers in charge has been poor, and has included physical and verbal abuse on numerous occasions.

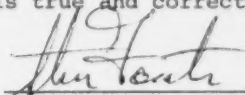
7. Hearings officers have given arbitrary ten (10) day to fourteen (14) day deadlines for the filing of political asylum applications. A ten (10) day period was found inadequate in Haitian Refugee Center v. Civiletti by the United States District Court for the Southern District of Florida. I am constantly rushed by one hearing officer through my hearings so that he can meet a scheduling calendar reportedly set by Chief Judge Monsanto. I have been precluded from introducing extremely important corroborative information establishing, for instance, that the asylum applicant had substantial wealth in Haiti and thus that "economic reasons" did not motivate his flight. Extremely relevant documentary evidence on the fate of returnees deported from the United States is either not admitted or not considered, as oral decisions are rendered immediately after such evidence is admitted, if it is allowed into evidence at all. This evidence is in the form of the findings of fact by Judge James L. King in the Civiletti case as well as reports by internationally recognized organizations such as the Lawyers Committee for International Human Rights and Amnesty International. The hearings officers don't even allow the Civiletti findings into evidence at all.

8. Present I.N.S. practices, as described, preclude a full and fair hearing for Haitians seeking political asylum in the U.S. Research by independent organizations and fact-finders confirms that persecution by Haiti's Ton Ton Macoutes often motivates flight from Haiti and that the Haitian Government has a practice and policy of arbitrarily imprisoning and often persecuting returnees as enemies of the Haitian Government. See Civiletti, supra, 503 F.Supp. 442,474-510.

9. Fair hearings are called for, and fair procedures, on the part of the Immigration and Naturalization Service. Only such hearings

instead of the persistent and continuing I.N.S. practice of mass-scheduling cases and denying claims across the board, coupled with access restrictions and a policy of indefinite imprisonment of asylum seekers, will separate the meritorious from the unmeritorious claims. Unlike many who come to the U.S. seeking a better life, the fate which awaits deported Haitians in Haiti is too ominous to allow even further erosion of the right of Haitians to claim political asylum in the United States.

10. I hereby declare on this date of October 14, 1981 under penalty of perjury that the foregoing is true and correct.



STEVEN FORESTER